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No. 07-659

In the Supreme Court of the United States

PHOENIX OF BROWARD, INC.,

Petitioner,

v.

MCDONALD'S CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides a cause of action to "any person who believes that he or she is or is likely to be damaged" by another's false advertising. The question presented is:

Whether the Eleventh Circuit correctly held—consistent with the Fifth Circuit but in conflict with at least five other courts of appeals—that a direct competitor may lack prudential standing to bring a claim for false advertising under Section 43(a) of the Lanham Act, despite having suffered a competitive injury caused by the false advertising of its primary rival.

RULE 29.6 STATEMENT

Petitioner Phoenix of Broward, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Eleventh Circuit, App., *infra*, 1a-33a, is reported at 489 F.3d 1156 (2007). The decision of the district court, App., *infra*, 34a-51a, is reported at 441 F. Supp. 2d 1241 (N.D. Ga. 2006).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. On September 5, 2007, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 22, 2007. On October 12, 2007, Justice Thomas further extended the time for filing to and including November 19, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides, in pertinent part:

> (a) Civil action
>
> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

STATEMENT

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), provides a cause of action to "any person who believes that he or she is or is likely to be damaged" by another's false advertising. At issue in this case is whether a plaintiff that has suffered a competitive injury as a result of the false advertisement of its direct competitor may be denied prudential standing to bring suit under the Lanham Act.

I. Statutory Background

Congress passed the Lanham Act in recognition of the increasingly national nature of commerce and the resulting needs to "protect the public from deceit

[and] to foster fair competition." S. Rep. No. 1333, 79th Cong., 2d Sess. 4 (1946). To that end, the Act "creat[es], in essence, a federal law of unfair competition," S. Rep. No. 515, 100th Cong., 2d Sess. 40 (1988), and "provides a private remedy to a commercial plaintiff who[se] * * * commercial interests have been harmed by a competitor's false advertising." *Sandoz Pharm. Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990); see also, *e.g.*, *Barrus* v. *Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995); *Stanfield* v. *Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *Coca-Cola Co.* v. *Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987); *Norman M. Morris Corp.* v. *Weinstein*, 466 F.2d 137, 141 (5th Cir. 1972).

By its plain terms, the Act confers standing on "*any person* who *believes* that he or she is or is *likely* to be damaged" by false advertising. 15 U.S.C. § 1125(a) (emphasis added). It is widely acknowledged, however, that, because the Act's main goal is to remedy anticompetitive behavior, "Congress * * * did not contemplate that federal courts should entertain claims brought by consumers." *Serbin* v. *Ziebart Int'l Corp.*, 11 F.3d 1163, 1179 (3d Cir. 1993).

To prevail on the merits of a Section 43(a) claim, a plaintiff must establish that the advertising was false, see *Norman M. Morris*, 466 F.2d at 141-142—although the falsity or misleading nature of the advertising need not be either knowing or intentional, see *Vector Prods., Inc.* v. *Hartford Fire Ins. Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005). Section 43(a) forbids firms not only from making false claims about their competitors, but also from making misrepre-

sentations about their own promotions and products. *Serbin*, 11 F.3d at 1177 ("[C]ulpability attaches * * * to a defendant's false advertising with respect to the defendant's goods or services [and] to false advertising relating to the goods or services of others."); see *Time Warner Cable, Inc.* v. *DIRECTV, Inc.*, 497 F.3d 144 (2d Cir. 2007).

The plaintiff must also show "that it suffered actual harm to its business." *Quabaug Rubber Co.* v. *Fabiano Shoe Co.*, 567 F.2d 154, 161 (1st Cir. 1977) (citing *Electronics Corp. of Am.* v. *Honeywell, Inc.*, 358 F. Supp. 1230 (D. Mass.), aff'd per curiam, 487 F.2d 513 (1st Cir. 1973)). "A precise showing is not required, and a diversion of sales, for example, * * * suffice[s]." *Quabaug*, 567 F.2d at 161 (citing *H.A. Friend & Co.* v. *Friend & Co.*, 276 F. Supp. 707 (C.D. Cal. 1967), aff'd, 416 F.2d 526 (9th Cir. 1969)).

II. Factual Background

A. Competition In The Fast-Food Industry

Burger King Corporation franchises or owns approximately 11,000 Burger King fast-food restaurants throughout the world. App., *infra*, 55a.[1] Petitioner Phoenix of Broward, Inc. ("Phoenix") owns and operates one such franchise in Fort Lauderdale, Florida. *Id.* at 54a. McDonald's Corporation franchises or owns approximately 30,000 McDonald's fast-food restaurants around the world. *Id.* at 55a.

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[1] This case comes before the Court on respondent's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Accordingly, all allegations in petitioner's complaint, App., *infra*, 52a-71a, are deemed true.

As the district court correctly noted, McDonald's and Phoenix are "unquestionably" direct competitors. *Id.* at 45a. Indeed, McDonald's and Burger King are the fiercest rivals in the fast-food restaurant industry—at all relevant times, they were an established first and second among all hamburger chains. *Id.* at 57a.

The battle between these two chains focuses, in large part, on "competition for a market share." Richard K. Miller & Sandra E. McBride, *The 2002 Restaurant & Foodservice Market Research Handbook* 12 (2002). Not surprisingly, both firms fund massive marketing efforts—in 1999 alone, McDonald's and Burger King devoted $623 and $400 million, respectively, to media expenditures. *America's Top Brands*, Brandweek, June 19, 2000, (Special Issue: Superbrands), at 118; see App., *infra*, 57a-58a. Particularly relevant here, "McDonald's has for many years offered patrons the opportunity to win prizes * * * in games designed to attract customers away from competing fast food restaurants, including those owned by Burger King Franchisees, and divert them to McDonald's restaurants." *Id.* at 58a; see also Stuart Elliott, *McDonald's Finds Mr. Potato Head Appealing for Contest*, USA Today, Mar. 14, 1990, at B5 ("Contests are a staple at McDonald's restaurants along with fries and Big Macs. The reason: They help stimulate sales by providing a surprise to customers.").

McDonald's advertisements and promotions often have the desired effect. App., *infra*, 57a-59a. Competitors, in turn, are quick to respond with their own efforts to win back customers. See Michael McCarthy, *BK, 'LK' to Roar Again at X-Mas*,

Brandweek, Sept. 5, 1994, at 1. For example, in 1994, Burger King enjoyed a 30% increase in sales from a six-week promotion it ran in conjunction with Disney's *The Lion King*, and McDonald's responded with a two-week price special. Jim Kirk, *McD's Counters the 'King'*, Adweek E. Edition, Aug. 29, 1994, at 2. Reflecting on that particular campaign, one "McDonald's insider" offered a keen insight into the nature of the Burger King-McDonald's competition:

> "Burger King had the most successful promotion ever and they cleaned McDonald's clock with it[.] *Lion King* hit right into the core of McDonald's business. It hit right to what they call the 'shin kickers'; you know, the kids who are kicking their parents telling them where they want to go out to eat."

Ibid.

McDonald's Monopoly promotions have traditionally enjoyed similar levels of success. McDonald's 1987 Annual Report praised its original Monopoly promotion, noting that it "was the single most successful national promotion in McDonald's history." McDonald's Corp., Annual Report (Form 10-K), at 4, 16 (Apr. 20, 1988). After the striking success of its initial run, McDonald's returned to Monopoly-based promotions over the ensuing 20 years.

B. The Advertising Campaign

At issue in this case was a campaign of promotional games—including "Monopoly Games at

McDonald's," "The Deluxe Monopoly Game," and "Who Wants to be a Millionaire," App., *infra*, 58a—that McDonald's ran from 1995 to 2001, *id.* at 56a. To generate sales, attract customers, and engender customer loyalty, "McDonald's extensively advertised and promoted each of the games it offered to the public." *Id.* at 35a; see *id.* at 59a. In advertising these "customers' favorites," *id.* at 53a, McDonald's claimed that each customer had "a fair and equal" opportunity of winning each prize and listed the odds of winning the particular prizes, which ranged in value from food items to cars, *id.* at 59a-60a. To win the advertised million-dollar grand prize, individuals had to either obtain an instant-win game piece or collect a series of games pieces, which were typically attached to McDonald's food products. *Id.* at 58a-59a, 65a-66a.

By McDonald's own admission, the promotion generated an "unnatural spike in sales," App., *infra*, 59a, which yielded a "substantial amount of revenue over and above the normal revenue stream," *id.* at 35a. McDonald's benefited from this advertising scheme at the expense of Phoenix and other Burger King franchisees, which not only lost customers to this offer of high-value prizes, *id.* at 58a-59a, but also were compelled to take "counteractive" measures to attempt to regain their diverted business, *id.* at 62a-63a.

During the course of the McDonald's Monopoly promotion, the Federal Bureau of Investigation commenced a criminal investigation into suspected improprieties in the distribution of winning game pieces. Sometime after April 2000, the FBI notified

McDonald's of its investigation. App., *infra*, 61a. McDonald's nevertheless persisted in running its ad campaign, continuing to claim that all customers had a fair and equal chance of winning the prizes. Indeed, McDonald's "knowingly and deliberately" ran these false advertisements. *Id.* at 67a. In August 2001, the FBI and Department of Justice publicly revealed that the promotional games in question had been rigged from at least 1995 to August 2001. *Id.* at 60a-61a.

The FBI's investigation ultimately confirmed that McDonald's customers—far from having a "fair and equal" chance to win high value prizes—had virtually no chance to win them. Individuals hired by McDonald's to run the game had been systematically diverting winning game pieces to a network of co-conspirators, who had been claiming the prizes and then sharing the proceeds with their confederates. App., *infra*, 60a-61a. All told, "[t]his fraud scheme" funneled "at least $20 million in high-value prizes," *ibid.*, to an established "network of 'winners,'" *id.* at 36a.

III. Procedural Background

On February 22, 2006, petitioner Phoenix brought a proposed class action in the U.S. District Court for the Northern District of Georgia to vindicate competitive injuries it and similarly situated Burger King franchisees suffered as a result of McDonald's violation of Section 43(a) of the Lanham Act. App., *infra*, 5a. Phoenix alleged that McDonald's advertisement of the rigged games as presenting a "fair and equal" opportunity to win violated the Lanham Act's

prohibition on false advertising and enriched McDonald's at the expense of Phoenix and other Burger King franchisees. *Id.* at 38a. In particular, Phoenix alleged that, "[d]espite knowing that the integrity of its promotional games had been compromised, McDonald's continued to advertise and promote its games as though customers stood a fair and equal chance of winning the high-value prizes." *Id.* at 61a. Phoenix further alleged that "[s]uch representations were all literally false, deceptive and/or misleading." *Ibid.*

"As the direct and proximate result of these false, deceptive and/or misleading misrepresentations, McDonald's diverted business away from Burger King Franchisees, and also obtained windfall profits that it would not otherwise have obtained." App., *infra*, 57a; see also *id.* at 62a-63a ("As the direct and proximate result of McDonald's false * * * advertising and unfair competition, customers were diverted from Phoenix[,] * * * who accordingly not only lost profits due, *inter alia*, to reduced sales, but also incurred costs in connection with the common counteractive efforts to retain those customers."). McDonald's thus competitively injured Phoenix and other Burger King franchisees by depriving them of the revenue, market share, and customer loyalty associated with each diverted sale, and by necessitating costly counteractive measures, such as additional targeted advertising expenses. *Id.* at 57a-59a, 62a-63a, 65a-68a.

McDonald's moved to dismiss these claims on the ground that Phoenix lacked prudential standing

under the Lanham Act.[2] App., *infra*, 39a. The district court granted the motion. Noting that "courts have developed two tests to determine whether a plaintiff has prudential standing to assert a false advertising claim under the Lanham Act," *id.* at *43a*, the district court joined the Fifth Circuit in holding that direct competitors who have alleged a competitive injury must nonetheless satisfy a five-factor prudential standing test, *id.* at 44a. That test was set forth in *Conte Bros. Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998), in which the Third Circuit examined prudential standing for Lanham Act claims brought by *non-direct* competitors. App., *infra*, 44a (citing *Procter & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 562-564 (5th Cir. 2001)). As restated by the district court, the five *Conte Bros.* factors included: "(1) the nature of the plaintiff's alleged injury, (2) the directness or indirectness of the asserted injury, (3) the proximity or remoteness of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages." *Ibid.*

Lauding the "flexibility" of the *Conte Bros.* test, App., *infra*, 44a—but apparently unconcerned that it was devised for a distinct class of plaintiffs (*i.e.*, non-direct competitors)—the district court concluded that Phoenix lacked prudential standing to sue

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[2] Alternatively, McDonald's argued (i) that the criminal conduct of the individuals hired by an outside firm to oversee security was an intervening cause that severed McDonald's liability; and (ii) that Phoenix failed to satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b). App., *infra*, 39a. Because it dismissed the case on standing grounds, the district court did not reach either issue. *Id.* at 50a.

McDonald's under Section 43(a) of the Lanham Act, *id.* at 50a. In so holding, the district court claimed that consumers were better suited to "vindicate the public interest by suing McDonald's for fraud," *id.* at 47a, and that "there is no need to empower Phoenix to act as a private attorney general in this case," even though the district court simultaneously acknowledged that "customers do not have standing to sue under the Lanham Act," *id.* at 48a.

The Eleventh Circuit affirmed. The court of appeals first held that Phoenix had properly demonstrated Article III standing by alleging (1) a competitive injury ("customers were diverted * * * [and therefore Phoenix] lost profits due, *inter alia*, to reduced sales * * * [and] incurred costs in connection with common counteractive efforts to retain those customers"); (2) that those injuries were caused by McDonald's false advertising ("[a]s a direct and proximate result of McDonald's false * * * advertising and unfair competition, customers were diverted"); and (3) that the injury can be redressed by the relief sought in this Section 43(a) suit (*i.e.*, "actual damages" from lost sales and "other damages incurred, [including] advertising costs incurred to respond to the fixed promotional games."). App., *infra*, 7a-8a.

It then concluded that prudential standing limitations applied to the Lanham Act, App., *infra*, 11a,[3] but it expressly acknowledged courts' conflicting

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[3] The court of appeals reached that conclusion in part because Congress did not expressly abrogate the prudential standing doctrine when enacting the Lanham Act. App., *infra*, 9a-10a. It also considered it significant that, although a literal reading of

standards for that inquiry, *id.* at 14a-20a. In the Eleventh Circuit's view, "the Seventh, Ninth, and Tenth Circuits have come the closest to 'categorically' holding that the plaintiff must be in 'actual' or 'direct' competition with the defendant and assert a 'competitive injury to establish prudential standing under § 43(a).'" *Id.* at 14a. "In contrast," the court concluded, "the First and Second Circuits have applied a less categorical approach to determine standing, wherein the dispositive issue is not the degree of 'competition,' but whether the plaintiff has a 'reasonable interest' to be protected against the type of harm that the Lanham Act is intended to prevent." *Id.* at 16a.[4]

The Eleventh Circuit, however, joined the Fifth Circuit—and, in its view, the Third Circuit[5]—in holding that even a direct competitor alleging a competitive injury must satisfy the five *Conte Bros.* factors. App., *infra*, at 12a. The court of appeals

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the statute would permit "[a]ny person who shall be injured in his business or property" to bring suit, the Act's purpose is to protect those engaged in commerce from unfair competition. *Id.* at 10a. In the Eleventh Circuit's view, that purpose suggests a congressional intent to circumscribe the class of potential plaintiffs beyond what the text of statute denotes. *Id.* at 10a-11a.

[4] As we explain below, pp. 16-21, *infra*, the Eleventh Circuit was correct to note that the First and Second Circuits do not apply *Conte Bros.* to direct-competitor claims, but it mischaracterized those courts as having adopted a more restrictive approach to such claims.

[5] As we also explain below, pp. 21-26, *infra*, the Eleventh Circuit mistakenly concluded that the Third Circuit intended the *Conte Bros.* test to apply to claims by direct competitors.

expressly acknowledged the "tension" between the categorical and *Conte Bros.* tests, *id.* at 18a n.5, specifically rejecting the suggestion that the *Conte Bros.* test was functionally similar to the categorical approach when applied to direct competitors, *id.* at 19a-20a. It explained that courts need not "blindly accept a plaintiff's allegation that it is a 'competitor' that has suffered a 'competitive injury,'" *id.* at 19a-20a; instead, they must look beyond such allegations to examine whether a plaintiff has met the five *Conte Bros.* factors, *id.* at 20a.

Applying the *Conte Bros.* factors, the court held that the first factor (type of injury) weighed in favor of standing, recognizing that Phoenix's claim "that its 'commercial interests' were 'harmed by a competitor's false advertising'" was "the type of harm the Lanham Act was intended to redress." App., *infra*, at 21a-22a. The third factor (proximity to harmful conduct) likewise supported Phoenix's standing, because there is "no 'identifiable class' of persons that is *more* proximate to the claimed injury" than Phoenix. *Id.* at 28a.

The court of appeals concluded that the remaining factors counseled in the opposite direction. Examining the second factor (directness of the injury), the court determined that Phoenix's claim that it lost customers due to McDonald's false promotion was "tenuous." App., *infra*, 25a. The fourth factor (speculative nature of damages) pointed against standing because "the fast food market consists of *many* competitors, only two of which are McDonald's and Burger King, * * * requir[ing] too much speculation" to evaluate what portion of Burger King's lost sales were attributable to McDonald's false claims. *Id.* at

28a. Finally, the court held that the fifth factor (risk of duplicative damages or complexity in apportioning them) did not favor Phoenix because "every fast food competitor of McDonald's" could bring suit, *id.* at 30a, and because "apportioning damages among these competitors would be a highly complex endeavor," *id.* at 31a. Noting that it was "a close question," the court of appeals concluded that, "on balance," the totality of factors weighed against petitioner's standing to bring suit. *Id.* at 32a.

REASONS FOR GRANTING THE PETITION

This case presents a deep conflict on an issue at the core of the Lanham Act's false-advertising prohibition. As the decision below expressly acknowledged, the courts of appeals have adopted divergent tests for determining whether a direct competitor has prudential standing to bring suit against its rival. At least five circuits require that a direct competitor allege only a competitive injury caused by the false advertisement. The court of appeals below, however, joined one other circuit in holding that direct competitors must satisfy a much more stringent five-factor test initially devised for claims brought by a class of plaintiffs—*i.e.*, non-direct competitors—at the periphery of the Lanham Act's protections.

That division is highly consequential. By importing the restrictive five-factor test to claims by direct competitors, the Eleventh Circuit held—at the 12(b)(6) stage, no less—that a Burger King franchisee had no standing to sue McDonald's for the latter's false (and, by all accounts, wildly successful) advertising. Standing alone, that conclusion is simply puzzling—direct competitors alleging a

competitive injury are quintessential Lanham Act plaintiffs. What is more, the test adopted below allows some of the most egregious Lanham Act violations to go unpunished simply because a court determines (before even taking evidence) that *proving* questions of causation and damages apportionment would be "complex." A rule that insulates from suit defendants who engage in a nationwide false advertising campaign that injures multiple competitors cannot be squared with the Act's goal to promote fair competition. To the contrary, the Act's objectives would seem to *require* that such plaintiffs have at least the *opportunity* to prove their claims.

I. The Courts Of Appeals Are Divided Over The Test That A Direct Competitor Must Satisfy To Meet The Prudential Standing Requirements Of Section 43(a) Of The Lanham Act

As the Eleventh Circuit expressly acknowledged below, the courts of appeals are divided over the prudential standing test that a direct competitor must satisfy to bring a false advertising claim under the Lanham Act. App., *infra*, 12a-18a & n.2. The majority of courts of appeals that have considered the issue—the Second, Third, Seventh, Ninth, and Tenth Circuits—require that a direct competitor allege only a competitive injury caused by the false advertising. Conversely, the Fifth and Eleventh Circuits demand that a direct competitor satisfy a five-factor test requiring examination of the (1) type, (2) directness, and (3) proximity of the injury; (4) the probability of damages; and (5) the complexity of their apportionment. In operation—and as specifically interpreted by the court below—that multifactor test has been

employed to deny standing to direct competitors who have suffered a competitive injury as a result of a rival firm's false advertising. This Court should grant review to resolve the striking inconsistency between those tests.

A. Five Circuits Require Direct Competitors To Allege Only A Competitive Injury Caused By The False Advertisement

As the court of appeals correctly recognized below, "the Seventh, Ninth, and Tenth Circuits" have held that direct competitors "categorical[ly]" have standing to bring suit under Section 43(a) when they allege a competitive injury suffered as a result of a rival firm's false advertising. App., *infra*, 14a & n.4. For example, the Ninth Circuit has held that "claims of false representations in advertising are actionable under section 43(a) when brought by [injured] competitors of the wrongdoer." *Waits* v. *Frito Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1993). Recognizing that Section 43(a) effectuates the "Lanham Act's * * * purpose of preventing 'unfair competition,'" *ibid.*, the Ninth Circuit requires that direct competitors "allege commercial injury based upon a misrepresentation about a product, and also that the injury was 'competitive,' i.e., harmful to the plaintiff's ability to compete with the defendant." *Barrus* v. *Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (quoting *Halicki* v. *United Artists Commc'ns, Inc.*, 812 F.2d 1213 (9th Cir. 1987); see also *Jack Russell Terrier Network of N. Cal.* v. *American Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9th Cir. 2005) (competition is the touchstone of standing to bring a false advertising claim under the Lanham Act).

Expressly relying upon the Ninth Circuit's opinion in *Waits*, the Tenth Circuit likewise has held that "to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury." *Stanfield* v. *Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995) (citing *Waits*, 978 F.2d at 1109); see also *Hutchinson* v. *Pfeil*, 211 F.3d 515, 520 (10th Cir. 2000). The Seventh Circuit—also citing *Waits*—likewise requires a direct competitor to allege a competitive injury. *L.S. Heath & Son, Inc.* v. *AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) ("In order to have standing to allege a false advertising claim * * * the plaintiff must assert a discernible competitive injury.") (citing *Waits*, 978 F.2d at 1109); see also *Dovenmuehle* v. *Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 699 (7th Cir. 1989) ("Typically, plaintiffs suing under [the Lanham Act] are business competitors claiming to be injured as a result of false advertising."); *Johnny Blastoff, Inc.* v. *Los Angeles Rams Football Co.*, 188 F.3d 427, 438 (7th Cir. 1999).

The Second Circuit has followed suit, relying on decisions from the Seventh, Ninth, and Tenth Circuits to hold that "'to have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.'" *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001) (quoting *Stanfield*, 52 F.3d at 873 and citing *L.S. Heath & Son, Inc.*, 9 F.3d at 575, and *Waits*, 978 F.2d at 1109).[6] The Third Circuit

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[6] Although acknowledging that the Second Circuit has not adopted the exacting five-factor test endorsed below, the Eleventh Circuit's opinion characterized the Second Circuit's

takes the same view, recognizing that "[t]he traditional [Lanham Act] plaintiff * * * has been a competitor who was injured in his line of business as a result of the false advertising." *Thorn* v. *Reliance Van Co.*, 736 F.2d 929, 931 (3d Cir. 1984). Accordingly, the Third Circuit has held that the Lanham Act "provides a private remedy to a commercial plaintiff who[se] * * * commercial interests have been harmed by a competitor's false advertising." *Sandoz Pharm. Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990); see also *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 180 (3d Cir. 2001) ("Section 43(a) is intended to provide 'a private remedy to a commercial plaintiff who * * * prov[es] that its commercial interests have been harmed by a competitor's false advertising.'") (quoting *Serbin* v. *Ziebart Int'l Corp.*, 11 F.3d 1163, 1175 (3d Cir. 1993)).[7]

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test as "less categorical" than that followed in "the Seventh, Ninth, and Tenth Circuits." App., *infra*, 14a. That confusion appears to stem from the fact that the Second Circuit sometimes generically frames the prudential standing inquiry as whether a Lanham Act plaintiff has "demonstrate[d] a reasonable interest to be protected against the advertiser's false or misleading claims, and a reasonable basis for believing that this interest is likely to be damaged by the false or misleading advertising." *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (internal citations and quotations omitted); see *ITC Ltd.* v. *Punchgini, Inc.* 482 F.3d 135, 169 (2d Cir. 2007) (same). Consistent with its holding in *Telecom*, however, the Second Circuit has made abundantly clear that a direct competitor alleging a competitive injury necessarily has the requisite "reasonable interest." *ITC Ltd.*, 482 F.3d at 169; see also *Societe Des Hotels Meridien* v. *LaSalle Hotel Operating P'ship*, 380 F.3d 126 (2d Cir. 2004).

[7] Like the Second Circuit, the Third Circuit sometimes generically frames the Lanham Act standing inquiry as whether

In sum, direct competitors alleging a competitive injury caused by a rival's false advertising "categorically" establish prudential standing in the Second, Third, Seventh, Ninth, and Tenth Circuits. Not surprisingly, our research has not revealed a single reported decision in which those circuits have denied prudential standing to such a plaintiff—indeed, they seldom even question direct competitor standing.[8]

Moreover, several courts that have not squarely addressed the question have observed that a direct competitor alleging a competitive injury resulting from a competitor's false advertising would satisfy Lanham Act prudential standing considerations. See, *e.g.*, *Made in the USA Found.* v. *Phillips Foods, Inc.*, 365 F.3d 278, 281 (4th Cir. 2004) ("[W]e [have] noted in passing that the Lanham Act is 'a private remedy [for a] commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising.'") (quoting *Mylan Labs., Inc.* v. *Matkari*, 7 F.3d 1130,

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the plaintiff has alleged a "reasonable interest to be protected against false advertising." *Serbin*, 11 F.3d at 1176 (internal quotation marks omitted). However, the Third Circuit has explicitly distinguished the prudential standing analysis applied to direct competitors' claims from that applied to claims by firms with less immediate relationships. See, *e.g.*, *Warner-Lambert Co.* v. *Breathassure, Inc.*, 204 F.3d 87, 95 (3d Cir. 2000) ("The standing inquiry was necessary because defendant's products and the plaintiff's products were not in obvious competition.").

[8] See, *e.g.*, *S.C. Johnson & Son, Inc.* v. *Clorox Co.*, 241 F.3d 232 (2d Cir. 2001); *Hot Wax, Inc.* v. *Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999); *Cottrell, Ltd.* v. *Biotrol Int'l, Inc.*, 191 F.3d 1248 (10th Cir. 1999); *Southland Sod Farms* v. *Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997).

1139 (4th Cir. 1993)); *Alpo Petfoods, Inc.* v. *Ralston Purina Co.*, 720 F. Supp. 194, 213 (D.D.C. 1989) ("In the instant case both parties are direct competitors * * * and as such clearly have standing to sue."), aff'd in part, rev'd in part on other grounds, 913 F.2d 958 (D.C. Cir. 1990); *Camel Hair & Cashmere Inst. of Am., Inc.* v. *Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986) (citing Second and Third Circuit prudential standing inquiries with approval, although not articulating a test for direct competitors).[9]

B. The Fifth And Eleventh Circuits Apply A Restrictive Five-Factor Prudential Standing Test To Direct Competitors

The Fifth and Eleventh Circuits apply a significantly more restrictive prudential standing test to direct competitors' Lanham Act claims. Those courts require that direct competitors that have suffered a competitive injury must nonetheless satisfy a five-factor test to pursue their false-advertising claims under the Lanham Act. As we explain below, that departure from the majority rule has metastasized (perversely) from a Third Circuit case that, in effect, took a somewhat more *expansive* view of Lanham Act standing to encompass certain

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[9] The court below confused matters when it cited the First Circuit's decision in *Camel Hair* as adhering to the "less categorical approach" for evaluating direct competitors' standing. App., *infra*, 14a. That case did not involve direct competitors. 799 F.2d at 6-8. Thus, *Camel Hair* illustrates only what a non-direct competitor must establish in the First Circuit to satisfy the Lanham Act's prudential standing restriction.

claims by plaintiffs who are *not* in direct competition with the defendant.

1. The Third Circuit's *Conte Bros.* Test For Noncompetitors

In *Conte Bros. Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998), the court examined "whether retailers have standing under § 43(a) of the Lanham Act * * * to bring false advertising claims against manufacturers of products that compete with those the retailers sell." *Id.* at 223. The court, in an opinion by then-Judge Alito, concluded that "the mere fact that [plaintiff] was not a competitor of [the defendant] d[id] not, in and of itself, preclude him from bringing suit under section 43(a)." *Id.* at 230 (quoting *Thorn*, 736 F.2d at 933). Noting that its prior cases had "grappled with defining * * * with greater precision" the circumstances under which a non-direct competitor has a "reasonable interest" protected by the Lanham Act, the court sought an "appropriate method for adding content to our 'reasonable interest' test." *Id.* at 231, 233.

To that end, the Third Circuit borrowed a test this Court had developed to determine when prudential standing under the Clayton Act extended beyond direct competitors and consumers. In *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), the Court considered whether a labor union suing a contractors' association with which it had entered into a bargaining agreement had "antitrust standing" to bring a claim seeking treble damages for

anticompetitive conduct. *Id.* at 535 n.31. The Court in *Associated General Contractors* recognized that, because the plaintiff was "neither a consumer nor a competitor," it would not suffice to satisfy the standing analysis applied to traditional antitrust plaintiffs. *Id.* at 539; see *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977) (competitor's alleged injury need only "reflect the anticompetitive effect * * * of the violation"). The Court concluded that standing nonetheless would be appropriate in situations where a noncompetitor's injury is "inextricably intertwined" with injury suffered by a competitor. 459 U.S. at 538 (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 484 (1982)). The Court, however, deemed it necessary to define "a point beyond which the wrongdoer should not be held liable"—that is, how far beyond direct competitors and consumers the Clayton Act could reach. *Id.* at 534 (citing *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J. dissenting)). In drawing that line, the Court developed a five-factor test that focused on "the burden on the judicial system that would result if the private right of action were available to remotely injured plaintiffs." Ronald Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 Antitrust L.J. 697, 698 (2003).

The *Conte Bros.* court borrowed those five factors to ascertain whether a non-direct competitor should have standing to bring a false-advertising claim under Section 43(a) of the Lanham Act. Those factors were: (1) "[t]he nature of the plaintiff's alleged injury"; (2) "[t]he directness or indirectness of the asserted injury"; (3) "[t]he proximity or remoteness of

the party to the alleged injurious conduct"; (4) "[t]he speculativeness of the damages claim"; and (5) "[t]he risk of duplicative damages or complexity in apportioning damages." 165 F.3d at 233. After analyzing each factor, the Third Circuit held that the plaintiff-retailer lacked prudential standing to sue the defendant-manufacturer. *Id.* at 236.

Since deciding *Conte Bros.*, the Third Circuit has applied that test to other non-direct competitors. See, *e.g.*, *Joint Stock*, 266 F.3d at 180. But, significantly, that court has *not* applied it to claims by direct competitors, despite numerous opportunities to do so. See, *e.g.*, *Novartis Consumer Health, Inc.* v. *Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 595 (3d Cir. 2002) (discussing standing considerations relevant to claim by direct competitor); see also, *e.g.*, *GlaxoSmithKline Consumer Healthcare, L.P.* v. *Merix Pharm. Corp.*, 197 Fed. App'x 120 (3d Cir. 2006) (not questioning standing, much less applying *Conte Bros.* restrictions to direct-competitor claim); *Wellness Publ'g* v. *Barefoot*, 128 Fed. App'x 266 (3d Cir. 2005) (same).

2. The Fifth And Eleventh Circuits Mistakenly Have Applied *Conte Bros.* To Direct Competitors

Even though *Conte Bros.* applied only to claims by non-direct competitors, the Fifth and Eleventh Circuits have imported that five-factor test to *restrict direct competitors'* standing under the Lanham Act. *Procter & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 562 (5th Cir. 2001); App., *infra*, 12a ("[W]e * * * adopt

the test for prudential standing articulated in *Conte Bros.*").

In *Procter & Gamble*, plaintiff Procter & Gamble ("P&G") brought suit under Section 43(a) of the Lanham Act against its direct competitor, Amway, for false advertising. 242 F.3d at 542 n.1 ("Amway manufactures and distributes household products, many of which *compete directly* with P&G's products.") (emphasis added). P&G alleged that Amway had instigated or spread a rumor that P&G maintained ties to a church practicing Satanic worship. *Id.* at 542. The district court held that P&G lacked standing to bring the false-advertising claim, *Procter & Gamble Co.* v. *Amway Corp.*, 80 F. Supp. 2d 639, 680 (S.D. Tex. 1999), and the Fifth Circuit affirmed. After "survey[ing] the caselaw of other circuits," the court of appeals "adopt[ed] the test * * * set forth in *Conte Bros.*," apparently without regard to the fact that *Conte Bros.* did not involve direct competitors. 242 F.3d at 562. The court of appeals then concluded that all five *Conte Bros.* factors "unanimously (though to various degrees) counsel[ed] against standing in this circumstance." *Id.* at 564.[10]

In the decision below, the Eleventh Circuit "join[ed]" the Fifth Circuit in applying the multifactor *Conte Bros.* test to direct competitors' false advertising claims. App., *infra*, 12a. The court of

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[10] Illustrating the conflicting standards, P&G brought a parallel case in the Tenth Circuit based on substantially identical allegations against Amway. Under the Tenth Circuit's test, however, the court did not even question P&G's standing. *Procter & Gamble Co.* v. *Haugen*, 317 F.3d 1121 (10th Cir. 2003).

appeals expressly acknowledged that Phoenix and McDonald's were alleged to be direct "competitors in the fast food industry," App. *infra*, 2a, but it held that they nonetheless were required to submit to the multifactor analysis under *Conte Bros.*, *id.* at 12a. The court of appeals acknowledged that several other circuits had taken a contrary view. *Id.* at 14a ("Of the circuits that have not adopted the *Conte Bros.* test, the Seventh, Ninth, and Tenth Circuits have come the closest to categorically holding that the plaintiff must be in actual or direct competition with the defendant and assert a competitive injury to establish prudential standing under § 43(a).") (internal quotation marks omitted). Compare *id.* at 15a-16a ("In contrast to the Seventh, Ninth, and Tenth Circuits, the First and Second Circuits have applied a less categorical approach to determine standing."), with *id.* at 12a n.2 ("To date, the Third and Fifth Circuits are the only circuits to have adopted the test set forth in *Conte Bros.*").

Significantly, the court of appeals expressly rejected any attempt to harmonize the "categorical" approach with the *Conte Bros.* test, holding that direct competitors alleging a competitive injury do not "invariably satisfy" the *Conte Bros.* factors. App., *infra*, 19a.[11] In the court's view, it need not "blindly

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[11] The Eleventh Circuit's half-hearted suggestion that "the *Conte Bros.* test and the categorical approach are not *necessarily* on opposite sides of a circuit split," App., *infra*, 18a n.5 (emphasis added), simply cannot be squared with its simultaneous confession that the two "contrast[ing]," *id.* at 16a, tests are in "tension," *id.* at 18a n.5, and its explicit refusal to interpret *Conte Bros.* to "invariably" grant standing to direct competitors alleging a competitive injury, *id.* at 19a.

accept a plaintiff's allegation that it is a 'competitor' that has suffered a 'competitive injury.'" *Id.* at 19a-20a. True to its word, the court of appeals concluded that petitioner could not—even at the preliminary 12(b)(6) stage—satisfy the *Conte Bros.* test. The court of appeals noted that "the first and third *Conte Bros.* factors weigh in favor of prudential standing, while the second, fourth, and fifth factors weigh against prudential standing." *Id.* at 31a-32a. Although admitting that it was a "close question," the court concluded that "on balance, Phoenix does not have prudential standing to bring its claim against McDonald's." *Ibid.* at 32a.

* * *

As this case comes before the Court, it is beyond dispute that Phoenix and McDonald's are direct competitors and that McDonald's false advertisements caused competitive injury to Phoenix. Under the legal standard adopted by the Second, Third, Seventh, Ninth, and Tenth Circuits, those allegations would satisfy the prudential standing inquiry. In the Fifth and Eleventh Circuits, however, importation of the *Conte Bros.* standard sets a much higher hurdle, leading those courts to deny standing to certain direct competitors alleging a competitive injury. The conflict is stark, meaningful, and intolerable, and this Court should resolve it.[12]

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[12] There is still further confusion among the courts of appeals regarding the prudential standing test that applies to claims brought by firms that are *not* direct competitors. For example, the Ninth and Tenth Circuits hold that non-direct competitors cannot satisfy prudential standing considerations under virtually any circumstance, while the Second, Third, and Seventh Circuits appear to have allowed standing for such plaintiffs under certain conditions. Compare *Jack Russell*, 407

II. Applying The *Conte Bros.* Test To Direct Competitors Directly Contradicts The Purposes Of The Lanham Act

Review is further warranted because the decision below undermines the fundamental statutory purpose of Section 43(a) of the Lanham Act, namely: "to protect the interests of a purely commercial class against unscrupulous commercial conduct." *Colligan* v. *Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971). To further that goal, the Act "provides a private remedy to a commercial plaintiff who[se] * * * commercial interests have been harmed by a competitor's false advertising." *Sandoz Pharm.*, 902 F.2d at 230. Denying standing to direct competitors undermines that objective by barring many of the plaintiffs that the statute was expressly designed to aid. A rule that prevents Burger King franchisees from suing McDonald's for injuries "directly and

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F.3d at 1037 (no prudential standing for the named targets of an allegedly false advertisement because they were not competitors) and *Stanfield*, 52 F.3d at 873 (no prudential standing for an inventor of agricultural product in an action against a manufacturer because "plaintiff is not now, nor has he ever been, in competition with defendants"), with *Ortho Pharm.*, 32 F.3d at 694 ("We have held that * * * a plaintiff * * * need not demonstrate that it is in direct competition with the defendant or that it has definitely lost sales because of the defendant's advertisements."), *Dovenmuehle*, 871 F.2d at 699 ("A party need not be in direct competition with a defendant to challenge a defendant's practices under the Act."), and *Conte Bros.*, 165 F.3d at 232 (rejecting the Ninth Circuit's rule granting prudential standing only to direct competitors). Although this Court need not resolve that broader conflict in this case, it is certainly fairly within the question presented and additional guidance for non-direct competitors' Lanham Act claims would no doubt be welcomed by the lower courts.

proximately caused" by the latter's nationwide campaign of false advertising cannot be squared with the Act's central purpose.

A. Restricting Standing For Direct Competitors Violates The Long-Established Principle That Direct Competitors Are Prototypical Lanham Act Plaintiffs

As numerous courts have recognized, direct competitors are the prototypical Lanham Act plaintiffs. See, *e.g.*, *Made in the USA Found.*, 365 F.3d at 281; *Stanfield*, 52 F.3d at 873; *Dovenmuehle*, 871 F.2d at 699; *Thorn*, 736 F.2d at 931. "[C]ompetitors have the greatest interest in stopping misleading advertising, and a private cause of action under section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously." *Coca-Cola Co.* v. *Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987). The rule adopted below—which works to deny standing to direct competitors whose claims may require detailed assessment of a false advertisement's anticompetitive effects or involve complex damages calculations—is fundamentally inconsistent with the Lanham Act's singular focus on ferreting out "unfair competition." See S. Rep. No. 515, 100th Cong., 2d Sess. 40 (1988).

Competitors' role in effectuating the Lanham Act's objectives is particularly critical because courts "categorical[ly] den[y] * * * Lanham Act standing to consumers." *Made in the USA Found.*, 365 F.3d at 281. In that sense the Act is unlike other statutes

designed to redress anticompetitive conduct (*e.g.*, federal antitrust statutes). As a result, if a direct competitor is denied prudential standing, there is not another group of plaintiffs waiting in the wings to enforce the Lanham Act's prohibitions. Here, for example, if Burger King franchisees do not have standing to sue their arch rival McDonald's under the Lanham Act for the latter's false advertising, then no plaintiff does. Particularly at this stage of litigation—where the allegations of falsity, causation, and injury have been thoroughly pleaded and *must be taken as true*—the standing rule adopted below cannot be reconciled with the Act's fundamental objective to promote a level commercial playing field.

Competitors are not the only casualties when the Lanham Act is not enforced—consumers, too, rely (albeit indirectly) on the Act's protections. Although "the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers." *Alpo Petfoods, Inc.*, 720 F. Supp. at 212. While "the rival firm is the ultimate beneficiary" of the cause of action, the Act recognizes that "purchasers will be protected by competitor-instigated suits." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 837 (1999). Thus, restricting suits by direct competitors not only affects a rival firm's bottom line, it also harms consumers, who are the direct targets of the false advertising and are likewise victims of a noncompetitive marketplace.

B. The Rule Adopted Below Permits Many Of The Most Egregious Lanham Act Violations To Go Unpunished

More troubling still, applying the *Conte Bros.* test to direct competitors will have the perverse effect of allowing some of the most egregious violations of Section 43(a)—here, a multiyear nationwide false advertising scheme by a corporate giant—to go unpunished under the Lanham Act.[13] Such campaigns will often occur in relatively thick markets with multiple direct competitors and will reach millions of consumers—all of which creates the potential for significant and widespread competitive injury. As the decision below reveals, however, those circumstances make a court *less* likely (paradoxically) to grant standing under the second, fourth, and fifth *Conte Bros.* factors. A prudential standing rule that provides safe harbor for some of the most flagrant and harmful Lanham Act violators plainly frustrates Congress's intent to combat unfair competition. This case illustrates that dynamic all too well.

1. The Eleventh Circuit noted below that, under the second *Conte Bros.* factor (directness of the

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[13] Although McDonald's settled state lawsuits brought on behalf of injured *consumers*, that settlement did nothing to remedy the harm the false advertisements inflicted on its competitors. See App., *infra*, 4a-5a. To the contrary, McDonald's settled those cases by sponsoring another consumer giveaway—former McDonald's customers and members of the general public were given the opportunity to win one of fifteen $1,000,000 prizes. *Id.* at 5a. That is cold comfort to Burger King franchisees and other competitors who lost more than the *chance* to win a prize—they lost *actual* customers to McDonald's and spent *actual* dollars combating the false advertising.

injury), Phoenix would need to establish that, but for the false advertising, customers "would have eaten at *Burger King* (as opposed to one of numerous other fast food competitors)." App., *infra*, 25a. It then determined that "the causal chain linking McDonald's alleged misrepresentations * * * to a decrease in *Burger King's* sales is tenuous, to say the least" and concluded that the second factor weighed against standing. *Ibid.* But petitioner's claim is no more "tenuous" than one by any other plaintiff alleging that the national ad campaign of its direct competitor was false and caused injury. Indeed, what more must a false-advertising victim allege? See *id.* at 62a-63a ("As the direct and proximate result of McDonald's false, misleading and/or deceptive advertising and unfair competition, customers were diverted from Phoenix and its Affiliate Franchisees."); *id.* at 66a-67a ("The BK Class Franchisees have also been damaged directly and proximately as a result of McDonald's false, misleading and/or deceptive advertising and unfair competition. * * * McDonald's actions have caused, *inter alia*, a diversion of trade away from the Plaintiff Franchisees.").

Perhaps the courts below questioned petitioner's ability to *prove* such allegations, but that is not a legitimate basis for refusing even to *entertain* the action. Prudential standing is primarily about "whether the plaintiff is 'a proper party to invoke judicial resolution of the dispute,'" not about whether the plaintiff is likely to win on the merits. *Conte Bros.*, 165 F.3d at 225 (quoting *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986)). A rule that permits a judge to rely on such doubts to deny a prototypical plaintiff any oppor-

tunity to prove its case turns the concept of standing on its head and severely limits the Lanham Act's effectiveness in redressing significant violations.[14]

2. Similarly, the fourth *Conte Bros.* factor (the speculativeness of the damages), would almost always militate against standing for direct competitors in large or, as in this case, national markets. As the Eleventh Circuit saw it,

> the fast food market consists of *many* competitors, only two of which are McDonald's and Burger King. In our view, it requires too much speculation to conclude that an ascertainable percentage of both the increase in McDonald's sales and the concomitant decrease in *Burger King's* sales during the several-year run [of the false advertising] is directly attributable to McDonald's alleged misrepresentations.

App., *infra*, 28a. But courts do not shy away from cases—particularly not at the 12(b)(6) stage—simply because they are large and potentially complicated. Contrary to the assumption underlying the rule adopted below, courts are well equipped to ascertain whether a particular injury occurred and, if so, who caused it.

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[14] Doubts about petitioner's ability to prove those allegations are simply puzzling. In 2001, the President and COO of McDonald's boasted that these promotions generated "an unnatural spike in sales," App., *infra*, 59a, and simple common sense suggests that those increased sales came at least in part at the expense of Burger King franchisees—not to mention the fact that petitioner specifically alleged as much in its complaint, *id* at 62a-63a.

It may be appropriate to apply a more restrictive test to a class of plaintiffs who are at the margins of the Act's protections, as the Third Circuit did in *Conte Bros.* But dismissing prototypical Lanham Act plaintiffs—*i.e.*, direct competitors—because it might be difficult to measure how many would-be Burger King customers were lured across the street to McDonald's is not a standing inquiry at all. Such difficulties do not suggest that the wrong party is bringing the action, or even that there is necessarily some defect in the plaintiff's case. Rather, those concerns are primarily the result of McDonald's decision to broadcast false statements nationwide. In other words, any complicated questions of proof that may arise in this case are primarily attributable to the fact that McDonald's is, well, *McDonald's*—it competes nationwide and it advertises nationwide. It is ultimately petitioner's burden to prove that chain of causation at trial, but a court cannot pretermit that inquiry by claiming that it would be too "speculative" to give Burger King franchisees *a chance* to do so.

3. Finally, the fifth *Conte Bros.* factor (the risk of duplicative damages or complexity in apportioning them) would almost always militate against prudential standing for practically *any* direct competitor in a nationwide market. For example, the Eleventh Circuit lamented that, "[i]f we were to hold that Phoenix has prudential standing to bring the instant claim, then every fast food competitor of McDonald's * * * would *also* have prudential standing to bring such a claim. * * * Furthermore, apportioning damages among these competitors would be a highly complex endeavor." App., *infra*, 30a-31a. But

it would be passing strange to think that a multibillion-dollar corporation that simultaneously competes with multiple firms is somehow insulated from the Lanham Act's false-advertising prohibition because apportioning damages among direct competitors might be "complex." There is no evidence to suggest that Congress intended to exclude such cases from the Lanham Act; to the contrary, a law aimed at reining in "unfair competition" surely would not ignore some of the most significant cases simply because sorting out such questions might be complicated.[15]

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[15] In the antitrust context, courts routinely resolve complicated questions regarding the causes and effects of anticompetitive behavior. See, *e.g.*, *Doctor's Hosp. of Jefferson, Inc.* v. *Southeast Med. Alliance, Inc.*, 123 F.3d 301, 306 (5th Cir. 1997) ("Although [the plaintiff's] theories of antitrust violations arise from the complex and rapidly evolving health care 'market,' they are hardly novel."). Just as "standing should not become the tail wagging the dog in 'classical' antitrust cases * * * by an allegedly excluded competitor," *ibid.*, courts should not dismiss claims by traditional Lanham Act plaintiffs—*i.e.*, direct competitors alleging a competitive injury—because proving the claims might be complicated.

Nor do courts typically jettison claims on standing grounds because there are multiple victims or because the apportioning damages might be difficult. In such cases, "[i]t is certainly acceptable through expert economic testimony to make a reasonable estimation of actual damages through probabilities and inferences." *Loeb Indus., Inc.* v. *Sumitomo Corp.*, 306 F.3d 469, 490 (7th Cir. 2002). Courts "recognize that such economic analysis * * * will not be easy[,] [b]ut complex litigation is hardly new for the federal courts." *Id.* at 493; see also *Mendoza* v. *Zirkle Fruit Co.*, 301 F.3d 1163, 1171 (9th Cir. 2002) (noting that even though damages calculations may be "exceedingly complex," such questions are "best addressed by economic experts and other evidence at a later stage in the proceedings" and not on the pleadings).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2007

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14726

D.C. Docket No. 06-00394-CV-CAP-1

PHOENIX OF BROWARD, INC.,
On behalf of Itself and Similarly
Situated Burger King Franchisees,
1101 S. Rogers Circle, Suite 10,
Boca Raton, Florida 33487,

Plaintiff-Appellant,

versus

MCDONALD'S CORPORATION,
One McDonald Plaza, Oak Brook,
Illinois 60523,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(June 22, 2007)

FILED
U.S. COURT OF APPEALS, ELEVENTH CIRCUIT
JUNE 22, 2007
THOMAS K. KAHN, CLERK

Before PRYOR, KRAVITCH and ALARCON,* Circuit Judges.

KRAVITCH, Circuit Judge:

The primary issue in this appeal is the proper test for determining whether a party has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Phoenix of Broward, Inc. ("Phoenix") appeals the district court's dismissal of its false advertising claim against McDonald's Corporation ("McDonald's") for lack of prudential standing. For the reasons that follow, we adopt the test for prudential standing set forth in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998), and affirm the district court's dismissal.

I. BACKGROUND

Burger King Corporation ("Burger King") owns, operates, and franchises fast food restaurants throughout the world. Today, there are approximately 11,000 Burger King restaurants worldwide. Appellant Phoenix is a licensed Burger King franchisee that owns and operates a Burger King franchise in Fort Lauderdale, Florida. McDonald's, like Burger King, owns, operates, and franchises fast food restaurants throughout the world, and there are approximately 30,000 McDonald's restaurants worldwide. As competitors in the fast food industry, both McDonald's and Búrger King have employed a variety of marketing

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

and promotional strategies to attract customers, generate sales, and ensure customer loyalty.

From 1995 to August 2001, McDonald's offered customers the opportunity to participate in various promotional games such as "Monopoly Games at McDonald's," "The Deluxe Monopoly Game," "Who Wants to be a Millionaire," and "Hatch, Match and Win." Each of the promotional games featured low-value, mid-value, and high-value prizes. The low-value prizes included low-dollar cash awards and food and beverage items, while the high-value prizes included automobiles and cash awards of up to $1 million dollars. In general, customers could win the $1 million grand prize in one of two ways—by obtaining one of the rare $1 million, instant-winner game pieces *or* by collecting and matching a combination of certain other game pieces.

McDonald's conducted an extensive advertising and marketing campaign for each of the games it offered. In these advertisements, McDonald's represented that all customers who participated in the games had a fair and equal opportunity to win the offered prizes. The advertisements also represented the specific odds of winning certain prizes, including the high-value prizes.

In approximately April 2000, the Federal Bureau of Investigation ("FBI") began investigating the promotional games. While the games were still underway, the FBI informed McDonald's that there were problems with the random distribution of its game pieces. In spite of this alleged knowledge, McDonald's continued to advertise that customers had a fair and equal opportunity to win the offered prizes, including the high-value prizes.

On August 21, 2001, the United States Department of Justice ("DOJ") and the FBI announced that between 1995 and August 2001, certain of McDonald's promotional games had been compromised by a criminal ring led by an employee of Simon Marketing, Inc. ("Simon"), the company McDonald's engaged to operate the promotional games. From approximately 1995 to August 2001, Simon's Director of Security, Jerome Jacobson, diverted at least $20 million in high-value prizes by embezzling winning, high-value game pieces and distributing them to a network of "winners" who claimed (or recruited others to claim) the prizes from McDonald's. The DOJ and FBI announced that eight individuals, including Jacobson, had been arrested in connection with the scheme. In announcing the arrests, the U.S. Attorney General stated that the "fraud scheme denied McDonald's customers a fair and equal chance of winning." In a corporate press release issued after the arrests, McDonald's Chairman and Chief Executive Officer described the scheme as "a highly sophisticated inside game of fraud and deception."

On or about April 5, 2002, Jacobson pleaded guilty to charges of conspiracy and mail fraud. Approximately 50 other persons either pleaded guilty or were convicted in connection with the conspiracy.

Following the disclosure of the scheme, McDonald's created an independent task force to review all of its promotional practices, and it introduced additional security procedures to ensure the integrity of future promotional games. Nonetheless, consumers throughout the U.S. filed several class actions against McDonald's, alleging

consumer fraud, negligence, and unjust enrichment. On April 19, 2002, McDonald's settled these class actions by, *inter alia*, agreeing to implement a $15 million "Instant Giveaway," providing class members and the general public an opportunity to win fifteen $1 million prizes.

On February 22, 2006, Phoenix filed the instant action against McDonald's on behalf of itself and all similarly situated Burger King franchisees (a proposed class of approximately 1,100 franchisees), alleging false advertising in violation of § 43(a) of the Lanham Act. Specifically, Phoenix alleged that McDonald's misrepresented that each player in its promotional games had a fair and equal chance of winning high-value prizes and misrepresented the specific odds of winning high-value prizes. According to Phoenix, McDonald's promotional games were "rigged from approximately 1995-2001," those games lured customers away from Burger King and yielded an "unnatural" spike in profits for McDonald's, the high-value prizes (including the $1 million prizes) were diverted from McDonald's customers, and the "advertising campaigns that touted million dollar prizes were literally false." Phoenix also alleged that after learning that the games had been compromised, McDonald's knowingly and deliberately continued to advertise the games as though customers had a fair and equal chance of winning.

McDonald's moved to dismiss Phoenix's complaint on the grounds that Phoenix lacked prudential standing under the Lanham Act and, in the alternative, that Jacobson's theft was an intervening cause of Phoenix's alleged injury. On August 1, 2006, the district court issued a written order granting McDonald's motion and dismissing the

action with prejudice. Noting that the Eleventh Circuit had not addressed the appropriate standard for determining whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, the district court surveyed the case law of other circuits and adopted the five-factor test set forth by the Third Circuit in *Conte Bros.*, 165 F.3d at 225, finding that test to be more "persuasive" than the "categorical approach" adopted by several other circuits. Applying the *Conte Bros.* test, the district court concluded that Phoenix did not have prudential standing to bring a false advertisement claim under the Lanham Act against McDonald's. Phoenix now appeals.

II. DISCUSSION

On appeal, Phoenix argues that the district court erred in dismissing its complaint against McDonald's for lack of prudential standing. "We review standing determinations *de novo*." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005). "We review a district court's grant of a motion to dismiss *de novo*, taking as true the facts as they are alleged in the complaint." *Owens v. Samkle Auto. Inc.*, 425 F.3d 1318, 1320 (11th Cir. 2005).

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004). As the Supreme Court has explained, standing jurisprudence is comprised of "two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* at 11-12, 124

S.Ct. at 2308 (internal quotation marks and citation omitted).

To demonstrate Article III standing, a plaintiff must allege that (1) he has suffered an actual or threatened injury, (2) the injury is fairly traceable to the challenged conduct of the defendant, and (3) the injury is likely to be redressed by a favorable ruling. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1304 (11th Cir. 2006).

McDonald's does not dispute that the allegations in Phoenix's complaint satisfy these constitutional standing requirements. Because the issue of constitutional standing is jurisdictional, however, we address it here. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91-93, 118 S.Ct. 1003, 1011, 140 L.Ed.2d 210 (1998) (stating that the question of Article III standing is jurisdictional and should be addressed before issues of prudential and statutory standing); *Conte Bros.*, 165 F.3d at 225.

In its complaint, Phoenix alleges that "[a]s a direct and proximate result of McDonald's false . . . advertising and unfair competition, customers were diverted from Phoenix and its Affiliated Franchisees, who accordingly not only lost profits due, *inter alia*, to reduced sales, but also incurred costs in connection with common counteractive efforts to retain those customers." Although Phoenix does not allege that McDonald's or any of its employees participated in the theft that led to the compromising of the high-value games (allegedly rendering McDonald's advertisements false), Phoenix does allege that after McDonald's learned that the high-value games had been

compromised, it knowingly and deliberately advertised that customers had a fair and equal opportunity to win high-value prizes. These allegations satisfy the first two prongs of the constitutional standing inquiry—Phoenix alleges that it has suffered an actual injury that is fairly traceable to McDonald's alleged misconduct. *See Primera Iglesia*, 450 F.3d at 1304. In relief, Phoenix requests, among other things, "actual damages, in amounts to be demonstrated at trial for the harms directly and proximately caused by McDonald's false . . . advertising" and "other damages incurred," including "advertising costs incurred to respond to the fixed promotional games." If granted, this relief would redress the injuries alleged and thus satisfies the third prong of the standing inquiry. *See id.* Based on the allegations in the complaint, we conclude that Phoenix has satisfied the requirements of constitutional standing.

Even where constitutional standing exists, however, prudential considerations may preclude standing. *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 n.12 (11th Cir. 2001). We therefore turn to the issue of prudential standing.

A. Whether Prudential Standing Doctrine Applies to the Lanham Act

We must first determine whether Congress intended to abrogate prudential standing doctrine in passing § 43(a) of the Lanham Act. Section 43(a) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce

> any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action *by any person who believes that he or she is or is likely to be damaged* by such act.

15 U.S.C. § 1125(a) (emphasis added).

The issue of whether prudential standing doctrine applies to § 43(a) of the Lanham Act is one of first impression in this circuit. The Third and Fifth Circuits have addressed this question, and both have held that Congress did not abrogate prudential limitations on the standing of plaintiffs to bring suit under § 43(a). *See Conte Bros.*, 165 F.3d at 227-230; *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561-62 (5th Cir. 2001). We agree.

Congress is presumed to incorporate background prudential standing limitations unless

the statute expressly negates such principles. *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 1162, 137 L.Ed.2d 281 (1997). Although § 43(a)'s use of the term "any person" might lead to the conclusion that Congress intended to negate the background of prudential standing by allowing "any person" who could achieve Article III standing to bring suit, "the Supreme Court has twice held that Congress has not expressly abrogated prudential standing doctrine merely by passing a statute the text of which admits a broad interpretation." *Conte Bros.*, 165 F.3d at 227. For example, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Supreme Court held that Congress did not abrogate prudential standing principles when it enacted the Clayton Act, despite statutory language allowing "[a]ny person who shall be injured in his business or property" to bring suit under that act. 459 U.S. 519, 535 & n.31, 103 S.Ct. 897, 907 & n.31, 74 L.Ed.2d 723 (1983). And as noted by the courts in *Conte Bros.* and *Procter & Gamble*, language contained in § 45 of the Lanham Act "makes clear that the focus of the [Lanham Act] is on anti-

competitive conduct in a commercial context,"[1] so that conferring standing to the full extent implied by the plain language of § 43(a) would give standing to parties that have *not* had their competitive or commercial interests affected by the defendant's conduct. *Conte Bros.*, 165 F.3d at 229; *Procter & Gamble*, 242 F.3d at 561. Rather, "[t]he congressionally-stated purpose of the Lanham Act" evinces a congressional "intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers" that congressionally stated purpose. *Conte Bros.*, 165 F.3d at 229.

Accordingly, in light of the text of § 43(a) and the purpose of the Lanham Act as expressed in § 45, we join the Third and the Fifth Circuits and hold that Congress did not intend to abrogate prudential standing limitations when it enacted the Lanham Act.

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[1] Section 45 provides in pertinent part:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; *to protect persons engaged in such commerce against unfair competition*; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.

15 U.S.C. § 1127 (emphasis added).

B. The Appropriate Test for Prudential Standing Under § 43(a)

Phoenix argues that the district court applied the wrong test to determine whether Phoenix had prudential standing to bring its false advertising claim against McDonald's. According to Phoenix, the district court erred in applying the five-factor test articulated by the Third Circuit in *Conte Bros.*, and instead, the court should have applied the "categorical approach" that, according to Phoenix, "controls in most" of the circuit courts of appeals.

This court has not addressed the appropriate test for determining whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act. After surveying the caselaw from other circuits and examining the parties' arguments, we join the Third and Fifth Circuits and adopt the test for prudential standing articulated in *Conte Bros.*[2] We therefore hold that to determine whether a party has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, a court should consider and weigh the following factors:

> (1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the

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[2] To date, the Third and Fifth Circuits are the only circuits to have adopted the test set forth in *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 233 (3d Cir. 1998), as the standard for determining whether a plaintiff has prudential standing under § 43(a) of the Lanham Act. *See Am. Ass'n of Orthodontists v. Yellow Book USA, Inc.*, 434 F.3d 1100, 1104 (8th Cir. 2006).

> [Lanham Act]?
> (2) The directness or indirectness of the asserted injury.
> (3) The proximity or remoteness of the party to the alleged injurious conduct.
> (4) The speculativeness of the damages claim.
> (5) The risk of duplicative damages or complexity in apportioning damages.

Conte Bros., 165 F.3d at 233 (internal quotation marks and citations omitted);[3] *Procter & Gamble*, 242 F.3d at 562 (adopting the *Conte Bros.* test for determining prudential standing under the Lanham Act). We believe that this test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under . . . § 43(a)." *Conte Bros.*, 165 F.3d at 236. Indeed, "two prominent commentaries" have endorsed this standard. *Procter & Gamble*, 242 F.3d at 562 n.51 (citing 4 McCarthy, McCarthy on Trademarks and Unfair Competition § 27:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors* . . . ."); Restatement (Third) of Unfair Competition § 3 cmt.f (1995) ("In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under

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[3] In announcing this standard, the Third Circuit adopted the test for standing under the Sherman Act articulated by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). *Conte Bros.*, 165 F.3d at 233.

federal antitrust law may offer a useful analogy.")). And under this standard, "standing under the Lanham Act does not turn on the label placed on the relationship between the parties." *Conte Bros.*, 165 F.3d at 235.

Phoenix argues that this court should adopt the so-called "categorical approach" that is applied in the majority of the circuits, as under that approach, "actual" or "direct" competition is the "exclusive requirement" for determining prudential standing. To that end, Phoenix argues that the *Conte Bros.* test was formulated in order to extend prudential standing under the Lanham Act to parties who are *not* in "actual" or "direct" competition. Thus, according to Phoenix, the *Conte Bros.* factors "inevitably collapse" into the categorical approach when applied to a "direct competitor" alleging a "competitive injury," and therefore, direct competitors "invariably satisfy" the *Conte Bros.* requirements. We address each argument in turn.

Of the circuits that have not adopted the *Conte Bros.* test, the Seventh, Ninth, and Tenth Circuits have come the closest to "categorically" holding that the plaintiff must be in "actual" or "direct" competition with the defendant and assert a "competitive injury to establish prudential standing under § 43(a)."[4] *See, e.g.*, *Jack Russell Terrier*

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[4] Contrary to Phoenix's contention, it appears that the Fourth Circuit has not adopted the so-called categorical approach followed in the Seventh, Ninth, and Tenth Circuits. In *Made in the USA Foundation v. Phillips Foods, Inc.*, the Fourth Circuit stated that "in an earlier case involving commercial parties, we noted in passing that the Lanham Act is 'a private remedy [for a] commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising.'" 365 F.3d 278, 281 (4th Cir.

Network of N. Ca. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (holding that to establish "standing pursuant to the 'false advertising' prong of § 43(a) of the Lanham Act, a plaintiff must show: (1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant" (citation omitted)); *Hutchinson v. Pfeil*, 211 F.3d 515, 520 (10th Cir. 2000) (holding that the plaintiff lacked standing because his hopes of eventually obtaining a product to compete with the defendant's were too remote, and his inability to compete with the defendant was not a function of the defendant's alleged misconduct); *Johnny Blastoff, Inc. v. L.A. Rams Football Co.*, 188 F.3d 427, 438 (7th Cir. 1999) (holding that "a party

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2004) (quoting *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1139 (4th Cir. 1993)) (emphasis added). And after examining opinions from the First, Second, Third, Seventh, and Tenth Circuits, the Fourth Circuit acknowledged that "there might be some marginal differences in the circuits about what qualifies as a commercial or competitive interest for standing purposes under the Lanham Act" and determined that "the basic approach of other circuits . . . requires the Lanham Act plaintiff to be engaged in commercial activity." *Id.* at 280-81 (examining *Conte Bros.*, 165 F.3d at 229; *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 700 (7th Cir. 1989); *Berni v. Int'l Gourmet Rests. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11-12 (1st Cir. 1986)). The court endorsed this "basic approach," and as a result, it concluded that a consumer does not have standing to sue for false advertising under the Lanham Act. *Id.* at 281. Thus, rather than adopt the categorical approach followed by the Seventh, Ninth, and Tenth Circuits, the Fourth Circuit endorsed the "basic approach" of requiring that the plaintiff be engaged in commercial activity—an approach followed by all circuits that have addressed the issue. *Id.*

must demonstrate that it has a reasonable interest to be protected against conduct violating the Act[,]" by asserting "a discernable competitive injury" (internal quotations omitted)); *Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (holding that the plaintiff "must be a competitor of the defendant and allege a competitive injury"); *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) (holding that "the plaintiff must assert a discernible competitive injury"); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (same).

In contrast to the Seventh, Ninth, and Tenth Circuits, the First and Second Circuits have applied a less categorical approach to determine standing, wherein the dispositive issue is not the degree of "competition," but whether the plaintiff has a "reasonable interest" to be protected against the type of harm that the Lanham Act is intended to prevent. *See, e.g., Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994); *Camel Hair & Cashmere Inst., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986). In *Camel Hair*, a trade group of cashmere garment producers filed a Lanham Act suit alleging that a coat manufacturer had misrepresented the cashmere content of one of its products. 799 F.2d at 6-8. In discussing the issue of standing, the First Circuit said: "the plaintiff [must have] a *reasonable interest* in being protected [against false advertising]. . . . [I]t is [not enough] for the plaintiff merely to establish a falsehood in the defendant's advertising or marketing; the plaintiff must also show a link or 'nexus' between itself and the alleged falsehood." *Id.* at 11-12 (emphasis added). Concluding that the trade group had standing, the First Circuit stated that "[although] *none* of the [group's] members *compete with the*

defendant . . . their position as manufacturers and vendors of fabric and clothing containing cashmere *gives them a strong interest* in preserving cashmere's reputation as a high quality fibre." *Id.* at 12 (emphasis added).

In the Second Circuit, a plaintiff bringing a false advertising claim under the Lanham Act "must demonstrate both (1) a reasonable interest to be protected against the advertiser's false or misleading claims, and (2) a reasonable basis for believing that this interest is likely to be damaged by the false or misleading advertising." *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007) (internal quotation marks omitted); *accord Societe Des Hotels Meridien v. LaSalle Hotel Operating P'ship, L.P.*, 380 F.3d 126, 130 (2d Cir. 2004); *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 130 (2d Cir. 2000); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1111 (2d Cir. 1997). "The reasonable interest prong of this test includes commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive injury[,]" while "the reasonable basis prong requires the plaintiff to show *both* likely injury *and* a *causal nexus* to the false advertising." *ITC*, 482 F.3d at 169-70 (internal quotation marks omitted) (emphasis added). And under the Second Circuit's approach, a plaintiff asserting a false advertising claim under § 43(a) need not be a "competitor." *See PDK Labs*, 103 F.3d at 1111; *Ortho*, 32 F.3d at 694; *Berni v. Int'l Gourmet Rests. of Am., Inc.*, 838 F.2d 642, 648 (2d Cir. 1988). Instead, "where the plaintiff's products are not obviously in competition with [the] defendant's products," the "plaintiff must make a more substantial showing of injury and causation." *PDK Labs*, 103 F.3d at 1111 (quotation marks omitted).

Thus, contrary to Phoenix's assertions, the majority of the circuits do not hold "categorically" that actual or direct competition is the exclusive requirement for standing to bring a false advertising claim under the Lanham Act.[5]

We also disagree with Phoenix's assertion that the Third Circuit adopted the *Conte Bros.* test to "extend prudential standing" to parties who are not in "direct" or "actual" competition. In determining the appropriate test for prudential standing under § 43(a), the *Conte Bros.* court first noted that the Third Circuit's previous cases addressing § 43(a)'s standing requirements "defined the dispositive question of a party's prudential standing as whether the party has a *reasonable interest* to be protected against false advertising." *Conte Bros.*, 165 F.3d at 230 (internal quotation marks omitted) (emphasis added). Although the court had "never precisely defined the critical term 'reasonable interest,'" it had "carried forward this prudential 'reasonable interest'

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[5] Phoenix further contends that the district court erroneously framed the *Conte Bros.* test and the "categorical approach" as "opposite sides of a circuit split coin." Although we agree that the *Conte Bros.* test and the categorical approach are not necessarily on opposite sides of a circuit split, we nonetheless conclude that there is tension between the two approaches with regards to the degree of actual competition required between the plaintiff and the defendant. *See, e.g., Am. Ass'n of Orthodontists*, 434 F.3d at 1103-04 (recognizing differences between circuits that "have held, categorically, that false advertising claims not involving misuse of a trademark are actionable only when brought by competitors of the wrongdoer[,]" and those circuits that "have adopted a less categorical multi-factor test . . . that focuses judicial enforcement of the Lanham Act on the protection of commercial interests and the prevention of competitive harm" (internal quotation marks omitted)).

requirement and ha[d] grappled with defining the term with greater precision." *Id.* at 230-31. In adopting the five-factor test discussed above, the court expressly declined to adopt standards conferring standing only on "direct competitors or their surrogates," as such standards were "in tension" with language from a previous Third Circuit opinion which implied that parties "not in direct competition" may nonetheless "have standing to sue if they have a reasonable interest to be protected against false advertising." *Id.* at 232 (citing *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1176-77 (3d Cir. 1993)) (internal quotation marks omitted). The court also cited earlier cases from the First and Second Circuits that recognized standing for Lanham Act plaintiffs who were *not* in direct competition with the defendant. *Id.* at 231-32 (citing *PPX Enters., Inc. v. Audiofidelity, Inc.*, 746 F.2d 120 (2d Cir. 1984) (holding that the owner of royalty streams from a music recording had standing to sue a distributor of falsely labeled music recordings); *Camel Hair*, 799 F.2d at 11 (holding that a trade association of manufacturers of cashmere fibers and fabrics, but not of finished coats, had standing to sue retailers of coats falsely labeled as containing more cashmere than they had)). Thus, even before the *Conte Bros.* decision, the Third Circuit had implied, and the First and Second Circuits had held expressly, that parties who are *not* in "direct" or "actual" competition may nonetheless have prudential standing to bring false advertising claims under the Lanham Act.

Finally, we disagree with Phoenix's contention that "direct competitors" alleging a "competitive" injury "invariably satisfy" the *Conte Bros.* requirements. Rather than blindly accept a plaintiff's allegation that it is a "competitor" that has suffered a

"competitive injury," the *Conte Bros.* test is designed to determine whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff's "ability to compete" in the marketplace and erosion of the plaintiff's "good will and reputation" that has been directly and proximately caused by the defendant's false advertising. *Id.* at 234-36. Moreover, at least one federal court (in addition to the district court below) has applied the *Conte Bros.* test where the plaintiff and defendant were "direct competitors" and held that the plaintiff lacked prudential standing. *See, e.g., KIS, S.A. v. Foto Fantasy, Inc.*, 240 F. Supp. 2d 608, 610-11, 616 (N.D. Tex. 2002) (applying the *Conte Bros.* test and holding that the plaintiff, a manufacturer and operator of photo booths, lacked prudential standing to bring a false advertising claim against the defendant, also a manufacturer and operator of photo booths, even though the plaintiff and defendant were direct competitors in the photo booth industry). And even accepting Phoenix's argument, as stated above, we conclude that the *Conte Bros.* test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under" § 43(a) of the Lanham Act. *Conte Bros.*, 165 F.3d at 236.

In summary, we hold that to determine whether a plaintiff has prudential standing to bring a false advertising claim under § 43(a) of the Lanham Act, a court must consider and weigh the five factors articulated in the *Conte Bros.* opinion.

C. Applying the *Conte Bros.* Test for Prudential Standing

Phoenix argues that it satisfied the requirements of prudential standing under the *Conte Bros.* test. After examining and weighing the *Conte Bros.* factors, we conclude otherwise.

1. Type of Injury Alleged

The first factor directs us to determine "whether the alleged injury is of a type Congress sought to redress in providing a private remedy for violations of the Lanham Act." *Procter & Gamble*, 242 F.3d at 563. As the *Conte Bros.* court noted, the focus of § 43(a) is on protecting "commercial interests [that] have been harmed by a competitor's false advertising, and in secur[ing] to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not." *Conte Bros.*, 165 F.3d at 234 (alterations in original) (citation omitted).

In its complaint, Phoenix alleges that (1) McDonald's falsely advertised that customers who purchased its products had a fair and equal chance to win any of the prizes offered, including the high-value prizes; (2) during the run of the games, McDonald's experienced an "unnatural spike" in its sales while Burger King experienced a decrease in its sales; and (3) Burger King franchisees incurred counter-promotion costs in an effort to "lure back customers who frequented McDonald's while the fraudulent games were running." In our view, these allegations amount to an assertion by Phoenix that its "commercial interests" were "harmed by a

competitor's false advertising," and this is the type of harm the Lanham Act was intended to redress.[6] *See id.* at 234.

McDonald's argues that its "conduct was in no way anti-competitive" because it "was the victim of a criminal fraud scheme" perpetrated by a third party. According to McDonald's, "to the extent any of its advertising was 'false,' it was false solely because of the intervening criminal conduct of Jacobson and his coconspirators." We find this argument unavailing, however, because Phoenix alleges that McDonald's "knowingly and deliberately continued to advertise" that its customers had a "fair and equal chance" to win high-value prizes even after learning that the integrity of its promotional games had been compromised. Moreover, "[s]ection 43(a) provides a strict liability tort cause of action." *Vector Prods., Inc. v. Hartford Fire Ins. Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005) ("It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising.").

McDonald's also contends that Phoenix's alleged injuries are not competitive in nature because the challenged advertisements "did not tout the products and services of McDonald's or disparage the products and services of Burger King." We cannot

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[6] Although the *Conte Bros.* court held that the "loss of sales" suffered by the plaintiffs in that case did not detract from their "ability to compete" and thus was not the type of injury the Lanham Act was designed to redress, the court reached this conclusion after determining that the plaintiff-retailers were not *at all* in competition with the defendant-manufacturers. *Conte Bros.*, 165 F.3d at 234. Here, by contrast, Burger King is one of McDonald's direct competitors in the fast food industry.

agree. Although the advertisements did not disparage Burger King or tout some intrinsic quality of McDonald's goods and services, the advertisements nonetheless asserted that customers who patronized McDonald's restaurants had an opportunity to win prizes, including the high-value prizes that had been stolen. Moreover, Phoenix alleges that the promotional games were sometimes "physically attached to McDonald's products."

McDonald's further contends that because Phoenix "has neither alleged nor suggested that its reputation was adversely affected by McDonald's advertising," this lack of "reputational injury" counsels against prudential standing. Although McDonald's is correct in asserting that Phoenix does not allege that its reputation was harmed by McDonald's conduct, we cannot say that the lack of alleged "reputational injury," in and of itself, directs us to conclude that Phoenix has failed to allege the type of injury that the Lanham Act was intended to redress. Again, the Lanham Act is not only designed to protect against unfair erosion of a competitor's reputation, it is *also* designed to protect "commercial interests [that] have been harmed by a competitor's false advertising," *Conte Bros.*, 165 F.3d at 234 (alteration in original), and, as stated above, Phoenix alleges such harm. We therefore conclude that the first factor weighs in favor of prudential standing.

2. Directness of the Asserted Injury

The second factor requires us to examine the "directness" with which the defendant's conduct affected the plaintiff. Phoenix alleges that by falsely advertising that customers had a fair and equal opportunity to win high-value prizes, McDonald's

lured customers to its restaurants and away from Burger King restaurants. According to Phoenix, as a direct result of these false advertisements, it lost sales and incurred additional promotional expenses in its attempts to lure back the customers it lost to McDonald's during the fraudulent promotion.

On one hand, the causal chain Phoenix alleges is similar to that of the typical false advertising claim in which a plaintiff alleges that it lost sales and/or market share as a result of the defendant's false or misleading representations about some characteristic of the defendant's product or services. For example, in *Logan v. Burgers Ozark Country Cured Hams Inc.*, the Fifth Circuit concluded that the second *Conte Bros.* factor counseled in favor of standing where the plaintiff alleged that the defendant's "literally false advertising about its own goods influenced its customers to buy its product instead of [the plaintiff's] product." 263 F.3d 447, 461 (5th Cir. 2001). In so concluding, the *Logan* court stated that the plaintiff's ability to license its products "*may have been directly affected by* [the defendant's] false advertising" about the defendant's products. *Id.* (emphasis added). And in *Procter & Gamble*, the Fifth Circuit stated that the second factor weighs in favor of standing in cases where "one competitor directly injur[es] another by making false statements about its own goods and thus influenc[es] customers to buy its product instead of the competitor's product." *Logan*, 263 F.3d at 460 (citing *Procter & Gamble*, 242 F.3d at 563).

On the other hand, the causal chain Phoenix alleges is more attenuated than that alleged in cases like *Logan*. Phoenix essentially alleges that (1) McDonald's advertisements falsely represented that

customers had a fair and equal chance to win one of the "rare" high-value prizes if those customers patronized McDonald's restaurants and played its games; (2) as a direct result of the misrepresentation regarding the high-value prizes, McDonald's lured customers who would have eaten at *Burger King* (as opposed to one of numerous other fast food competitors), causing Burger King to lose sales; and (3) but for this misrepresentation, these customers would have eaten at Burger King, even though the chances of winning one of the "rare" high-value prizes would have been minute had there been no theft, even though only "certain" high-value prizes were stolen, and even though these customers still had a fair and equal opportunity to win all of the other prizes. Accepting Phoenix's allegations as true, the causal chain linking McDonald's alleged misrepresentations about one aspect of its promotional games to a decrease in *Burger King's* sales is tenuous, to say the least.

Taking care not to conflate the prudential standing inquiry with the "materiality" element Phoenix must establish to succeed on the merits of its claim, *see Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1250 (11th Cir. 2002) ("To succeed on a claim of false advertising, the plaintiff must establish that the defendant's deception is likely to influence the purchasing decision." (internal quotation marks omitted)), we conclude that the second factor counsels against prudential standing.

3. Proximity to the Allegedly Harmful Conduct

The third factor requires us to examine the proximity of the plaintiff to the allegedly harmful conduct. In examining this factor, we must determine whether there is an "identifiable class" of persons "whose self-interest would normally motivate them to vindicate the public interest" by bringing a suit. *Conte Bros.*, 165 F.3d at 234. "The existence of such a class diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 182 (3d Cir. 2001) (internal quotation marks omitted).

Here, the district court held, and McDonald's asserts on appeal, that the consumers who were denied a fair and equal opportunity to win the high-value prizes as advertised constitute an "identifiable class" of persons whose self-interest would normally motivate them to sue McDonald's regarding its false advertising. But this can be said about any false advertising claim, as the consumers who were diverted from the plaintiff's product to the defendant's product in reliance on the defendant's allegedly false advertisements would always have a natural self-interest in suing for fraud. As such, if we accept the district court's and McDonald's reasoning, this factor would never counsel in favor of prudential standing. Moreover, consumers would not be able to vindicate the public interest via the Lanham Act, as "the several circuits that have dealt with the question are uniform in their categorical denial of Lanham Act standing to consumers." *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 281 (4th Cir. 2004); *see also Conte Bros.*, 165 F.3d at 229 (reiterating

precedent holding that consumers lack standing under the Lanham Act and stating that a contrary conclusion would "ignore the purpose of" the Act); *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995) (holding that consumers lack standing to bring false advertising claims under the Lanham Act because they cannot allege either a commercial or competitive injury).

Furthermore, courts applying the *Conte Bros.* test have generally considered whether other *commercial entities* were the more appropriate parties to vindicate the competitive harm wrought by the defendant's alleged misconduct. *See, e.g.*, *Joint Stock Soc'y*, 266 F.3d at 182 (stating that Russian vodka manufacturers that exported vodka to the U.S. were better suited to bring a false advertising claim against the defendant and "were more proximate to the claimed injury" than the plaintiff-manufacturer that did not export its vodka to the U.S.); *Conte Bros.*, 165 F.3d at 235 (concluding that motor-oil manufacturers had a more concrete interest in preserving the reputation of motor oil than the plaintiffs as retailers of engine additives); *but see Procter & Gamble*, 242 F.3d at 563-64 (stating that although distributors "probably do not have standing to sue under the Lanham Act" because the Act "does not give consumers standing to sue[,]" distributors "are more immediate to the injury than is [plaintiff-manufacturer]" and "could vindicate the public interest . . . by suing for fraud"). As such, consumers "should be irrelevant to this analysis." *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 338 (5th Cir. 2002) (Benavides, J., concurring).

Again, Phoenix alleges that as a direct result of McDonald's false and misleading representations

regarding the high-value prizes, McDonald's lured customers away from Phoenix and its affiliated franchisees, which, in turn, lost sales and market share. Accepting these allegations as true, we can think of no "identifiable class" of persons that is *more* proximate to the claimed injury than fast food franchisees such as Phoenix and the putative class it seeks to represent. As such, the third factor weighs in favor of prudential standing.

4. Speculative Nature of the Alleged Damages

Under the fourth factor of the *Conte Bros.* test, we examine the speculative nature of the plaintiff's alleged damages. According to Phoenix, its damages are not "speculative" because it would be "relatively straightforward" to calculate its damages as "an appropriate share of all profits associated with sales generated by the fixed promotional games" based on market share. We disagree.

As the district court noted, only "certain" high-value prizes were stolen, and customers still had a fair and equal opportunity to win one of the relatively numerous low- and mid-value prizes McDonald's offered, because those prizes were unaffected by the theft. Moreover, the fast food market consists of *many* competitors, only two of which are McDonald's and Burger King. In our view, it requires too much speculation to conclude that an ascertainable percentage of both the increase in McDonald's sales and the concomitant decrease in *Burger King's* sales during the several-year run of the games is directly attributable to McDonald's alleged misrepresentations about the chances of winning high-value prizes.

Phoenix also argues that at the pleading stage, the focus should be on what the complaint alleges, not on whether Phoenix may be able to prove the exact number of customers lured to McDonald's, because this is a matter for discovery and expert testimony. Although "general factual allegations of injury resulting from the defendant's conduct *may* suffice" to support standing "[a]t the pleading stage," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (emphasis added), to "presume" that Phoenix's allegations "embrace those specific facts that are necessary to support" its claim to an appropriate share of McDonald's profits from the compromised games requires too much conjecture. *See id.* Even accepting Phoenix's allegations as true, the speculative nature of the damages it allegedly incurred as a result of McDonald's representations regarding the high-value prizes is inescapable.

Phoenix also contends that disgorgement of the profits McDonald's made during the "fixed" promotion would be an appropriate remedy "if the district court's premature fears [regarding the incalculable nature of Phoenix's damages] were substantiated." Disgorgement of "wrongful" profits "initially developed as a remedy to provide a plaintiff relief in equity, to serve as a proxy for damages, or to deter the wrongdoer from continuing his violations" and "is most appropriate if damages are otherwise nominal." *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1095-96 (7th Cir. 1994). But as the Third Circuit stated in *Joint Stock Soc'y*, "[i]f a request for relief that may be sought by any party sufficed under the fourth factor of the *Conte Bros.* test, that factor would be essentially meaningless, and we refuse to undermine the fourth factor in this way." *Joint Stock*

Soc'y, 266 F.3d at 185. "The aim of [prudential standing] is to determine whether the plaintiff is 'a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.'" *Conte Bros.*, 165 F.3d at 225 (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8, 106 S.Ct. 1326, 1334 n.8, 89 L.Ed.2d 501 (1986)). Accordingly, Phoenix may not bolster its "case for prudential standing by relying on forms of monetary relief that [it] would receive as a vicarious avenger of the general public's right to be protected against . . . false advertisements." *Joint Stock Soc'y*, 266 F.3d at 185 (internal quotation marks omitted).

We thus conclude that the fourth factor weighs against prudential standing.

5. Risk of Duplicative Damages

The fifth and final factor under the *Conte Bros.* test requires us to assess the risk of duplicative damages *or* the complexity of apportioning damages. The district court concluded that this factor weighs against standing. We agree.

If we were to hold that Phoenix has prudential standing to bring the instant claim, then every fast food competitor of McDonald's asserting that its sales had fallen by any amount during the relevant time period would *also* have prudential standing to bring such a claim. And if every fast food competitor had standing to bring such a claim, regardless of the amount in controversy, regardless of the amount of lost sales or market share directly attributable to the falsity of the advertisement, and regardless of the impact on the competitor's goodwill or reputation (as the advertisements made no mention of any

competitor), the impact on the federal courts would be substantial. Furthermore, apportioning damages among these competitors would be a highly complex endeavor.

Phoenix argues that courts applying the *Conte Bros.* test have assessed the risk of duplicative damages either by examining "the plaintiff's position in the distribution chain relative to the defendant" or by examining "whether the injury is directly related to the market" in which they compete. But courts applying the *Conte Bros.* test *also* have assessed the risk of duplicative damages by examining the number of potential claimants in the same position in the distribution chain as the plaintiff and/or in the same market as the plaintiff. For example, the Third Circuit in *Joint Stock Soc'y* assessed the fifth factor by noting that if the plaintiffs were granted prudential standing, false advertising claims could be brought against the defendant by, *inter alia*, all vodka manufacturers in the U.S. market *and* all vodka manufacturers who, like the plaintiffs, had not entered the U.S. market but had taken minimal preparatory steps for entry. 266 F.3d at 184-85. Thus, the *Joint Stock Soc'y* court considered both the number of potential claimants occupying the same position in the distribution chain as the plaintiffs (manufacturers) and the number of potential claimants in the same market as the plaintiffs (manufacturers who had not entered the U.S. market) to conclude that the fifth factor weighed against prudential standing. In *Logan*, the Fifth Circuit determined that the fifth factor weighed in favor of prudential standing because "Logan appear[ed] to be the only plaintiff who could bring a Lanham Act false advertising claim against [the defendant] based on" the challenged advertisements.

263 F.3d at 461. And in *Procter & Gamble*, the Fifth Circuit concluded that the fifth factor counseled against standing for Procter & Gamble in part because "*every competitor in the market* could sue" the defendant if Procter & Gamble were allowed standing. 242 F.3d at 564 (emphasis added).

Accordingly, we conclude that the fifth factor weighs against standing.

6. Weighing The Totality of the Factors

To summarize, the first and third *Conte Bros.* factors weigh in favor of prudential standing, while the second, fourth, and fifth factors weigh against prudential standing. Admittedly it is a close question, but we conclude that on balance, Phoenix does not have prudential standing to bring its claim against McDonald's. Although Phoenix and the class it seeks to represent are McDonald's "direct competitors," Phoenix has alleged a competitive harm to their commercial interests, and there is no identifiable class of persons that is more proximate to the claimed injury, because of the attenuated link between the alleged injury and McDonald's alleged misrepresentations, the speculative nature of the claimed damages, the potential complexity in apportioning damages, and the significant risk of duplicative damages, we hold that Phoenix does not have prudential standing to bring a false advertising claim under the Lanham Act against McDonald's.

In so holding, we say nothing about the outcome of this analysis if, for example, the facts were such that McDonald's had falsely advertised the odds of winning all of its prizes (low-, mid-, and high-value), *or* if McDonald's were only giving away a

single prize and falsely represented the odds of winning, as these hypotheticals present factual scenarios materially different from the facts of this case. Indeed, as stated above, a salient virtue of the *Conte Bros.* test is that it provides a flexible yet principled means of determining the existence of prudential standing for disparate factual scenarios, thereby allowing courts to foreclose standing on one set of facts while recognizing standing when presented with a slightly (but materially) different set of facts.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM**.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHOENIX OF BROWARD, INC. on behalf of itself and similarly situated Burger King Franchisees, Plaintiff, v. MCDONALD'S CORPORATION, Defendant.	CIVIL ACTION NO. 1:06-CV-394-CAP

ORDER

This matter is before the court on the defendant's motion to dismiss [Doc. No. 13].

Factual Background

The plaintiff, Phoenix of Broward, Inc. ("Phoenix"), is a licensed Burger King franchisee operating a Burger King fast food restaurant in Ft. Lauderdale, Florida. Although not a party to this lawsuit, Burger King Corporation owns, operates, and franchises Burger King fast food restaurants throughout the world. There are approximately 11,000 Burger King restaurants worldwide.

Like Burger King, the defendant, McDonald's

Corporation ("McDonald's"), owns, operates, and franchises fast food restaurants throughout the world. There are approximately 30,000 McDonald's restaurants in 119 countries, of which approximately 13,000 are located in the United States.

McDonald's and Burger King are competitors in the fast food restaurant industry. Both companies use a variety of promotional strategies to attract customers, generate sales, and engender customer loyalty. For example, beginning in 1995 and continuing until 2001, McDonald's ran games, such as the "Monopoly Game at McDonald's," "Hatch, Match and Win," and "Who Wants to be a Millionaire Game." Each of these promotional games had low-value, mid-value, and high-value prizes. Low-value prizes included food items and low dollar cash prices. High-value prizes included vehicles and cash of up to $1 million. Generally, there were two opportunities to win the $1 million grand prize: (1) by obtaining the $1 million instant winner game piece, or (2) by collecting certain game pieces.

McDonald's extensively advertised and promoted each of the games it offered to the public. As part of its advertisements, McDonald's allegedly represented that all customers had a fair and equal opportunity to win all of the offered prizes, including the high-value prizes. McDonald's advertisements also listed the odds of winning specific prizes.

According to Phoenix's complaint, because customers desired the opportunity to win the promoted prizes, especially the high-value prizes, McDonald's promotional games produced a substantial amount of revenue over and above the normal revenue stream.

In approximately April 2000, the Federal Bureau of Investigation ("FBI") began investigating McDonald's promotional games. According to Phoenix, at some time before or while the games were underway, the FBI informed McDonald's that there were problems with the random distribution of McDonald's game pieces. Despite this alleged knowledge, McDonald's continued to advertise and promote its games as if all customers had an equal opportunity to win the high-value prizes.

In 2001, the United States Department of Justice and the FBI announced that since at least 1995, certain of McDonald's promotional games had been compromised by a criminal ring led by an individual employed by Simon Marketing, Inc. ("Simon"), th company McDonald's engaged to operate its promotional games. Specifically, between at least 1995 and August 2001, Simon's Director of Security, Jerome Jacobson, diverted at least $20 million in high-value prizes from McDonald's games by embezzling game pieces and distributing them to a network of "winners." When describing Jacobson's crime, the Attorney General of the United States stated, "[t]his fraud scheme denied McDonald's customers a fair and equal chance of winning."

On or about April 5, 2002, Jacobson pled guilty to charges of conspiracy and mail fraud. Approximately 45 other individuals also entered guilty pleas in connection with the conspiracy.

Upon disclosure by McDonald's to the public that certain of its promotions had been fixed, McDonald's created an independent task force to review all of its promotional procedures. McDonald's

then introduced additional security procedures to ensure the integrity of future promotional games.

The disclosure of the fraud scheme also opened the floodgates to a wide variety of civil litigation against McDonald's. Consumers filed several class-action lawsuits against McDonald's alleging consumer fraud, negligence, and unjust enrichment. On April 19, 2002, McDonald's settled these lawsuits by, among other things, agreeing to implement a $15 million instant giveaway, which provided the public with the opportunity to win 15 $1 million prizes.

The consumer lawsuits, however, did not end McDonald's woes. On February 22, 2006, Phoenix filed this action against McDonald's on behalf of itself and all similarly situated Burger King franchisees. The proposed class includes over 1,100 Burger King franchisees. The only claim for relief alleged by Phoenix is a false advertising claim brought pursuant to § 43(a) of the Lanham Act.

Section 43(a) of the Lanham Act creates a "civil remedy for entities injured by their competitor's false or misleading advertising." *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 915 F. Supp. 360, 364 (M.D. Fla. 1996). The pertinent portion of the statute attributes liability to any person or entity who uses in commerce any false or misleading description of fact or false and misleading representation of fact which, in "commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services or commercial activities . . . ." 15 U.S.C. § 1125(a)(1)(B). To succeed on its false advertising claim, Phoenix has the burden of showing that: (1) McDonald's advertisements are false or

misleading; (2) the advertisements deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented advertisements affect interstate commerce; and (5) Phoenix has been or is likely to be injured as a result of the false advertising. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1247 (11th Cir. 2002).

In this case, Phoenix alleges that McDonald's advertisements stating that each player had a fair and equal chance to win the high-value prizes in the rigged games were false. In reality, many of the high-value prizes had been stolen by Jacobson's criminal ring. Phoenix claims that such advertising unlawfully diverted sales away from Burger King restaurants to McDonald's restaurants. Phoenix also alleges that McDonald's conduct was "intentional and/or sufficiently reckless" enough to subject McDonald's to treble damages.[1] For instance, Phoenix claims that McDonald's "knowingly and deliberately" continued to advertise that its games were fair after learning that the games were compromised.

As recompense for the "diversion of their customers," Phoenix asks the court to: (1) order McDonald's to disgorge an appropriate share of McDonald's profits associated with sales generated by the fixed promotional games, and (2) award the class their actual damages, treble damages, pre-judgment and post-judgment interest, and costs and expenses.

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[1] Although Phoenix claims that McDonald's conduct was intentional or reckless, nowhere in the complaint does Phoenix allege that McDonald's was involved in Jacobson's criminal plan, nor does Phoenix allege that McDonald's knew Jacobson was going to steal game pieces before he did.

Notably, Phoenix does not seek an injunction, presumably because the criminal activity causing the falsity of McDonald's advertisements ceased after the FBI and the Department of Justice concluded their investigation and Jacobson pled guilty.

On April 17, 2006, McDonald's filed the present motion to dismiss. McDonald's advances three arguments in support of its motion to dismiss. First, McDonald's argues that Phoenix lacks prudential standing to bring this lawsuit. Second, McDonald's asks the court to rule that the criminal conduct of Jacobson and his conspirators is an intervening cause that severs any possible liability on the part of McDonald's. Third, McDonald's claims that Phoenix's complaint should be dismissed because Phoenix failed to plead its Lanham Act claim with the specificity required by Federal Rule of Civil Procedure 9(b).

Legal Analysis

A. *Standard of Review and Novelty of Phoenix's Claim*

When considering a motion to dismiss, the court must accept the facts pleaded as true and construe them in a light favorable to the non-movant. *See Covad Communications Corp. v. BellSouth Corp.*, 299 F.3d 1272, 1279 (11th Cir. 2002).

Before reaching McDonald's standing arguments, the court must address the parties' initial disagreement. The parties spend much of their briefs arguing about whether Phoenix's theory of liability is novel. For instance, McDonald's argues that "never before has a company brought a Lanham Act claim

against a competitor whose advertising allegedly became 'false' or 'misleading' solely because of the felonious conduct of third parties." In response, Phoenix cites to *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081 (7th Cir. 1994) and *Lubrizol Corp. v. Exxon Corp.*, Civil Action No. 91-CV-1472 (N.D. Ohio) as examples of just such a complaint.

After reviewing the cases cited by the parties, the court concludes that both parties are partially correct. Phoenix is correct in the sense that companies have brought Lanham Act claims against competitors who argued that they acted in good faith when they generated the advertisement at issue. *See, e.g., Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958) (concluding that the fact that the name of a licensee's subsidiary appeared on a bread wrapper due to a mistake caused either by a third-party printer or the defendant was not a defense to a § 43(a) false designation of origin claim because there is no requirement that the falsification occur wil[l]fully or with the intent to deceive); *American Rockwool, Inc. v. Owens-Corning Fiberglass Corp.*, 640 F. Supp. 1411, 1449 (E.D.N.C. 1986) ("Plaintiff's contention that because it relied on a certified laboratory's test results in making its label representations, these representations cannot be false under the Lanham Act, is simply without merit . . . . This evidence could support a finding that the plaintiff reasonably should have known that its bag labels were false; again, there is no requirement under the Lanham Act of proof of specific knowledge of the falsity of the representation made."). For example, in *BASF*, 41 F.3d at 1081, Old World Trading Company advertised that its antifreeze met certain industry specifications. Old World did not, however, conduct its own testing. Instead, it

contracted out its antifreeze blending and testing to a third party, Dearborn Chemical Company. BASF brought suit against Old World, claiming that Old World never actually tested its antifreeze to determine whether it met the specifications. Old World responded by stating that Dearborn's representatives assured Old World that the antifreeze formula met the specifications. Despite Old World's claims of good faith, the Seventh Circuit affirmed the district court's holding that Old World was liable to BASF for false advertising.

The *BASF* case is consistent with the well-settled concept that no proof of intent or willfulness is required to establish a false advertising claim pursuant to § 43(a) of the Lanham Act. *See Vector Products, Inc. v. Hartford Fire Insurance Co.*, 397 F.3d 1316, 1319 (11th Cir. 2005); *see also* 1A Louis Altman, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5:28 (4th ed. 2006) ("As a general rule, [ ] courts do not inquire into the good or bad faith of the advertiser, or the purpose of the advertisement, in passing upon its truth or falsity. The deceptive or misleading quality of the advertisement is not vitiated by the advertiser's good faith and, accordingly, intent to deceive is not an element of the violation. An innocent state of mind does not diminish the false advertiser's unfair advantage over competitors."); Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception,* 78 Va. L. Rev. 40-41 (1992) ("Under current interpretations of section 43(a), advertisers are strictly liable both for an express or implied claim's falsity and for the fact that it was made. Thus, the advertiser's intent or her negligence is in principle irrelevant in two quite different ways . . . .

[A]s to the truth or falsity of the representation, it does not matter whether the advertiser believed it to be true, or even whether she had reasonable grounds for such a belief . . . ."). Rather, as the Eleventh Circuit has held, § 43(a) creates a strict liability tort cause of action. *Vector*, 397 F.3d at 1319. Thus, the fact that McDonald's acted in good faith when it created the advertisements at issue is not a defense to Phoenix's action.

On the other hand, McDonald's is correct in that the court has been unable to locate any case where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to the *felonious conduct* of *third* parties. Although arguably factually similar, *BASF* does not deal with allegedly felonious conduct. The *Lubrizol* case, moreover, does not have any published decisions, and the case was settled before final judgment.

B. *Standing*

Turning to the standing issue, McDonald's first substantive argument is that Phoenix lacks prudential standing to bring its false advertising claim. The requirement of standing is both a constitutional limitation on federal court jurisdiction and a prudential limitation on its exercise. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). The constitutional requirements for standing emanate from Article III of the United States Constitution, which states that federal courts may only adjudicate cases or controversies. *Allen v. Wright*, 468 U.S. 737, 750-51, 104 S. Ct. 3315, 3324 (1984). Constitutional standing requires only that a plaintiff have suffered an injury in fact, that there be

a causal connection between the injury and the defendant's conduct, and that the injury be redressable by a favorable court decision. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

In addition to the constitutional requirements, federal courts adhere to a second standing component that is based on prudential concerns. The goal of prudential standing, like constitutional standing, is to determine whether the plaintiff "is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n.8, 106 S. Ct. 1326, 1334 (1986).

The Eleventh Circuit has not addressed what test the court should use in determining whether a plaintiff has prudential standing to bring a Lanham Act false advertising claim. Outside the Eleventh Circuit, courts have developed two tests to determine whether a plaintiff has prudential standing to assert a false advertising claim under the Lanham Act. The Seventh, Ninth, and Tenth Circuits appear to have adopted a categorical approach, holding that to have standing to assert a Lanham Act false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury. *See Stanfield v. Osborne Industries, Inc.*, 52 F.3d 867, 873 (10th Cir. 1995); *L.S. Heath & Son, Inc. v. AT&T Information Systems, Inc.*, 9 F.3d 561, 575 (7th Cir. 1993); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992). On the other hand, the Third and Fifth Circuits have adopted a less categorical multi-factor test, based on the Supreme Court's test for antitrust standing, that focuses judicial enforcement of the Lanham Act on the protection of commercial interests and the prevention of competitive harm.

See Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233-35 (3d Cir. 1998); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 562-64 (5th Cir. 2001). Under the *Conte Bros.* test, five factors are relevant to the prudential standing analysis: "(1) the nature of the plaintiff's alleged injury, (2) the directness or indirectness of the asserted injury, (3) the proximity or remoteness of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages." *Id.* at 563.

After a survey of the caselaw in other circuits, the court finds the test set forth in *Conte Bros.*, 165 F.3d at 233-35, persuasive. *Cf. Alphamed Pharmaceuticals Corp. v. Arriva Pharmaceuticals, Inc.*, 391 F. Supp.2d 1148, 1161 (S.D. Fla. 2005) (using the *Conte Bros.* test to determine whether a biopharmaceutical company had standing to sue an alleged competitor for false advertising in violation of the Lanham Act). The *Conte Bros.* test provides the court with appropriate flexibility to address factually disparate scenarios, while at the same time supplying a principled means for addressing standing under the false advertising prong of § 43(a). Thus, the court will next address each factor of the *Conte Bros.* test separately.

1. *Whether Phoenix's Injury is the Type of Injury Congress Sought to Redress in the Lanham Act*

The first *Conte Bros.* factor directs the court to decide whether the "alleged injury is of a type Congress sought to redress in providing a private remedy for violations of the Lanham Act." *Procter &*

Gamble, 242 F.3d at 563. The Lanham Act has two aims: (1) vindicating commercial interests that have been harmed by a competitor's false advertising, and (2) securing to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not. *Conte Bros.*, 165 F.3d at 234.

While the court doubts that Congress sought to redress advertising rendered false by the criminal conduct of third parties,[2] the court concludes that this factor weighs in favor of a finding of standing. McDonald's and Phoenix are unquestionably competitors in the fast food industry. Also, as noted above, the Eleventh Circuit has described false advertising claims as "strict liability tort[s]." *Vector*, 397 F.3d at 1319. Accordingly, McDonald's good faith does not immunize it from liability, nor does it transform Phoenix's claim from the type of claim the Lanham Act was designed to prevent.

Although this factor weighs in favor of standing, the court concludes that it does so only weakly. The advertisements at issue did not tout McDonald's products or services, nor did they disparage the products or services of Burger King. Instead, the advertisements focused on the odds of winning certain high-value prizes in various promotional games. There is no indication that Burger King's good will or reputation was harmed

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[2] Phoenix does not allege that any employee of McDonald's was involved in Jacobson's criminal ring. At most, Phoenix claims that McDonald's continued to advertise that the rigged games were fair after it received notice from the FBI that it was investigating the possibility that the games were rigged. Phoenix also suggests that McDonald's security before learning of Jacobson's criminal activity was lax.

directly or indirectly by the allegedly false advertisements. As seems apparent from the spate of consumer lawsuits against McDonald's, if there has been any harm caused by Jacobson's criminal conduct, it has been McDonald's reputation that has ultimately suffered, not Burger King's.

In support of its argument that this factor is practically dispositive of the standing issue, Phoenix makes much of the fact that the advertisements at issue were literally false. For instance, Phoenix claims that a competitor who engages in literally false advertising moves directly to a damages defense. The court, however, fails to see how this changes the court's conclusion that this factor weighs only weakly in favor of standing. First, it is not true that a competitor whose advertisements are literally false only has a damages defense. The Eleventh Circuit has held that a plaintiff must still prove that the advertising was material to customers. *Johnson & Johnson*, 299 F.3d at 1250. Second, the alleged literal falsity of McDonald's advertisements does not change the fact that the injury to Phoenix's commercial interests caused by the advertisements can hardly be described as typical. Again, as noted above, McDonald's advertisements did not tout McDonald's products or services or disparage Burger King's products or services. Any effect, therefore, on Burger King's good will or reputation is absent or, at the very least, attenuated.

2. *The Directness of Phoenix's Injury*

The second *Conte Bros.* factor looks at whether the defendant's conduct has had a direct effect on either the plaintiff or the market in which the parties participate. *Joint Stock Society v. UDV North*

America, 266 F.3d 164, 181 (3d Cir. 2001). Phoenix describes its alleged direct injury as stemming from the fact that McDonald's misrepresented the odds of winning a few, but not all, of its prizes in certain promotional games and that this misrepresentation led to an "unnatural spike" in McDonald's profits. Phoenix then argues that customers would have eaten at Burger King, instead of McDonald's, had they known that a few of the high-value prizes in particular games were unavailable, even though all of the other prizes could be won. Even taking Phoenix's allegation that there is a causal connection between the two facts as true, it still requires Phoenix to prove a complex causal chain. Given the length and complexity of the causal links leading to Phoenix's "direct" injury, the court concludes that this factor weighs only moderately in favor of prudential standing.

3. *Proximity of Phoenix to the Allegedly Injurious Conduct*

The third factor requires the court to determine whether there is an identifiable class of persons whose "self-interest would normally motivate them to vindicate the public interest," thus diminishing the "justification for allowing a more remote party . . . to perform the offices of a private attorney general." *Joint Stock Society*, 266 F.3d at 182. The court construes the third factor as looking at whether there is an identifiable group that is better suited to vindicate the public interest, not at whether there is a better group to sue for false advertising under the Lanham Act. The court concludes that there is.

In this case, the harm caused by McDonald's

allegedly false advertisements more directly affects the customers who were denied the opportunity to compete for the few high-value prizes criminally co-opted by Jacobson. While these customers do not have standing to sue under the Lanham Act, they could and did vindicate the public interest by suing McDonald's for fraud. Thus, there is no need to empower Phoenix to act as a private attorney general in this case.

4. *Speculativeness of the Damages*

The fourth factor, the speculativeness of the damages, weighs heavily against standing. It is undisputed that only a few of the high-value prizes in each game were affected by Jacobson's criminal behavior. It is also undisputed that the low-value and mid-value prizes were unaffected by Jacobson's conduct and that McDonald's gave away millions of prizes in its contests. Phoenix, nevertheless, argues that some identifiable segment of the public that was planning on going to Burger King opted instead to go to McDonald's solely because it was seeking to win a high-level prize in one of McDonald's games.

Given the number of fast food competitors of McDonald's, as well as the difficulty in determining what percentage of customers would have gone to Burger King, and not some other restaurant, but for McDonald's allegedly false advertisements, it is hard to see how any damages awarded would not be highly speculative. Further, the fact that the promotional games took place over a period of several years in many geographic markets throughout the world also increases the speculativeness of the damages. Finally, the notion that Phoenix will be able to prove that some ascertainable number of customers visited

McDonald's for the specific purpose of winning one of the few high-value prizes that were affected by Jacobson's criminal behavior and cared nothing for the low-value and mid-value prizes is difficult to imagine.

5. *Risk of Duplicative Damages*

The fifth and final *Conte Bros.* factor asks the court to assess the risk of duplicative damages and the complexity of apportioning damages. Like the previous factor, this factor weighs heavily against standing. If the court were to find that Phoenix has standing to sue McDonald's over advertising that was rendered false by the criminal conduct of a third party concerning a promotional game, as opposed to McDonald's or Burger King's goods or services, it could engender copycat suits by each and every one of McDonald's competitors. Because damages are so speculative, the risk of broad and overlapping damages caused by these lawsuits is great. There is also a great risk that Phoenix's lawsuit will create an administratively complex damages proceeding.

Allowing prudential standing, moreover, would result in a great increase in litigation. If every fast food competitor had a cause of action for false advertising regardless of the speculativeness of the damages, regardless of any impact on the competitor's good will or reputation, and regardless of the remote nature of the injury suffered, the impact on federal courts would be significant.

6. *Weighing the Totality of the Conte Bros. Factors*

In sum, the first two factors weigh moderately

or weakly in favor of standing, while the remaining three factors weigh against prudential standing. Although it is true that Phoenix is a direct competitor of McDonald's, under the *Conte Bros.* test, standing does not turn on the label placed on the relationship between the parties. *Conte Bros.*, 165 F.3d at 235. Given the existence of more directly injured parties, the tenuousness and sheer speculativeness of Phoenix's damages claim, and the possibility of multiple duplicative recoveries, the court concludes that Phoenix does not have prudential standing to bring a § 43(a) false advertising claim against McDonald's.

C. *Whether Jacobson's Theft is an Intervening Cause that Severs McDonald's Liab[i]lity and Whether Phoenix Failed to Comply with Rule 9(b)'s Heightened Pleading Requirements*

Because the court concludes that Phoenix lacks prudential standing to assert a false advertising claim against McDonald's, there is no need for the court to address McDonald's remaining arguments in support of dismissal.

Conclusion

For the foregoing reasons, McDonald's motion to dismiss [Doc. No. 13] is GRANTED to the extent that the court concludes that Phoenix lacks prudential standing to bring its false advertising claim against McDonald's. Because Phoenix's false advertising claim is the only claim asserted by Phoenix, this action is DISMISSED WITH PREJUDICE and the clerk is DIRECTED to close the file.

SO ORDERED, this 1st day of August, 2006.

/ s / Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C

ORIGINAL
FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta, FEB 22 2006
LUTHER D. THOMAS, Clerk
BY: /s/ Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHOENIX OF BROWARD, INC. on Behalf of Itself and Similarly Situated Burger King® Franchisees, 1101 S. Rogers Circle, Suite 10 Boca Raton, Florida 33487, Plaintiff, v. McDONALD'S CORPORATION, One McDonald Plaza Oak Brook, Illinois 60523, Defendant.	)	1:06-CV- 0394-CAP CLASS ACTION COMPLAINT JURY DEMAND ENDORSED HEREON

Phoenix of Broward, Inc. on behalf of itself and similarly situated Burger King® Franchisees (collectively "Class BK Franchisees"), hereby refile their Complaint against Defendant McDonald's Corporation ("McDonald's"). These Plaintiffs first filed this Complaint in this Court on August 18, 2005, at which time it was assigned to the Honorable Charles A. Pannell, Jr. with the Case

No. 1:05-CV-02153. Thereafter, Plaintiffs voluntarily dismissed the case without prejudice pursuant to Fed.R.Civ.P. 41(a) on August 26, 2005. This Complaint is hereby refiled within the six months provided by law. For their Complaint against McDonald's, the Class BK Franchisees restate and reallege as follows:

I. *INTRODUCTION*

1. From July 11 through August 9, 2001, McDonald's marketed the 10th anniversary of its celebrated Monopoly promotions by offering consumers the chance to win another million dollars in "an exciting new . . . game." Just twelve days later, however, McDonald's confessed to the public not only that its anniversary game had been rigged, but so had many of the other games which had been its "customers' favorites." Indeed, a 16-month FBI investigation had ferreted out a sophisticated criminal ring engaged for years in what then-U.S. Attorney General John Ashcroft decried as a "fraud scheme" which "denied McDonald's customers a fair and equal chance of winning."

2. Although McDonald's declined to offer an apology, its spokesman declared that one of McDonald's "top priorities" was its "responsibility" to "return the money." A spate of litigation ensued thereafter, during which it was disclosed that McDonald's games had been rigged since at least 1995 and upwards of $25 million of high-level prizes had been wrongfully diverted from its contests, including virtually all of the million dollar prizes. Ultimately, years later, McDonald's settled multiple class action lawsuits on behalf of

consumers by running another game, this time offering 15 one million dollar prizes. McDonald's also paid an eyebrow-raising $16 million settlement to the very company it had hired to be responsible for the security of its games, but which fulfilled that responsibility by employing the ringleader of the entire scam.

3. These settlements, however, pale in comparison to the huge profits McDonald's reaped for years from luring customers away from its competitors with offers of hollow chances to win fortunes. Although McDonald's executives have acknowledged that such games produce an "unnatural spike in profits," McDonald's has never seen fit to compensate any of its competitors for the losses they suffered as a result of McDonald's unfair competition. The Lanham Act, however, provides federal statutory relief precisely for such losses, which the instant Plaintiffs now respectfully seek in this Court.

II. *PARTIES, VENUE AND SUBJECT MATTER JURISDICTION*

4. Phoenix of Broward, Inc. ("Phoenix") is, and at all relevant times herein was, a corporation organized and existing under the laws of the State of Florida with its principal place of business at 1101 S. Rogers Circle, Suite 10, Boca Raton, Florida 33487. Phoenix is a licensed Burger King Franchisee which operates a Burger King fast food restaurant at 666 W. Broward Blvd., Fort Lauderdale, Florida. Phoenix is also affiliated with a number of other licensed Burger King Franchisees which operate Burger King restaurants at other locations in the United

States ("Affiliate Franchisees"). As licensed Burger King Franchisees, Phoenix and its Affiliate Franchisees operate these restaurants so that they include the recognized design, decor, color scheme and style of buildings, as well as uniform standards, specifications and procedures relating to its operation, quality and uniformity of products and services, procedures for inventory and management.

5. Although not a party, Burger King Corporation ("Burger King") is, and at all relevant times herein was, a corporation organized and existing under the laws of the State of Florida with its principal place of business at 5505 Blue Lagoon Drive, Miami, Florida 33126. Burger King franchises licensed Burger King Franchisees, such as Phoenix and its Affiliate Franchisees, to operate independently owned fast food restaurants in the United States and abroad, and also directly owns and operates fast food restaurants in all of the United States and abroad. Since its founding in 1954, Burger King has become one of the leaders in the fast food industry with over 11,000 restaurant locations worldwide, which collectively serve over 11 million customers every day.

6. McDonald's is, and at all times relevant herein was, a corporation organized and existing under the laws of the State of Delaware with its principal place of business at One McDonald Plaza, Oak Brook, Illinois 60523. Like Burger King, McDonald's also owns, operates, and franchises fast food restaurants in all of the United States and abroad. There are approximately 30,000 McDonald's restaurants in 119 countries worldwide, of which approximately

13,000 are located in the United States. McDonald's restaurants reportedly serve approximately 50 million customers every day.

7. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because, *inter alia,* McDonald's resides in this District, and a substantial part of the events giving rise to the claims occurred in this District and Georgia.

9. McDonald's does business in the State of Georgia and this District, and accordingly has registered its authorized agent for service of process with the Georgia Secretary of State as Prentiss Hall Systems, Inc., 40 Technology Parkway South, No. 300, Norcross, Georgia 30092.

III. *ALLEGATIONS COMMON TO ALL CLAIMS*

A. *Introduction*

10. This case concerns McDonald's false, deceptive and/or misleading representations concerning promotional games that McDonald's used to attract customers to its restaurants and enhance customer loyalty from 1995 (if not earlier) through at least August 2001.

11. With respect to these promotional games, McDonald's explicitly and implicitly represented to the public that players stood a fair and equal opportunity to win certain grand prizes (and even went so far as to represent specific odds of

obtaining winning game pieces), when, in fact, the promotional games had been fixed by a criminal ring who embezzled the high-value game pieces and prevented the general public from winning such prizes.

12. As the direct and proximate result of these false, deceptive and/or misleading misrepresentations, McDonald's diverted business away from Burger King Franchisees, and also obtained windfall profits that it would not otherwise have obtained.

B. *Background*

13. McDonald's and Burger King have long been considered the two leading competitors in the fast food industry. Significantly, the daily competition to draw customers into their respective restaurants extends beyond price, food quality, menu selections and better service to include such other customer attractions as promotional contests and games, playgrounds, toy giveaways (as part of meals for children), restaurant design and tie-ins with popular motion pictures and television programs.

14. McDonald's devotes substantial sums to advertising and promoting its company-owned and franchised restaurants and products. Such advertising appears in virtually every form of media, including television, radio and print. McDonald's reportedly spends hundreds of millions of dollars each year on advertising. Upon information and belief, McDonald's further requires its franchisees not only to contribute substantial sums to McDonald's advertising and

promotic[illegible] expenditures, but, *inter alia,* to adhere [illegible] and participate in advertising and promotions developed and directed by McDonald's for all or substantial segments of the McDonald's system, including the rigged games promotions described herein.

C. ***McDonald's Promotional Games***

15. McDonald's has for many years offered patrons the opportunity to win prizes, ranging from food and drink prizes to cash prizes of up to $1 million, in games designed to attract customers away from competing fast food restaurants, including those owned by Burger King Franchisees, and divert them to McDonald's restaurants, thereby generating for McDonald's greater sales, customer loyalty and market share.

16. McDonald's games have included, *inter alia,* "Monopoly Game at McDonald's," "Hatch, Match and Win," "When the USA Wins You Win," "The Deluxe Monopoly Game," "The Monopoly and More Game at McDonald's," "Disney's Masterpiece Collection Trivia Challenge at McDonald's," "Who Wants to be a Millionaire Game," and "Pick Your Prize Monopoly."

17. Each of the promotional games has had low-value, mid-value and high-value prizes. Customers have had the opportunity to become instant winners or winners by collecting specific game pieces. Low-value prizes have included food items and low dollar cash prizes. High-value prizes have included vehicles and cash of up to one million dollars. Generally, there have been two opportunities to win the one million dollar grand

prize, one by obtaining the one million dollar instant winner game piece and one by collecting certain game pieces.

18. Promotional games have been an important and material part of McDonald's advertising strategy. Because customers desire the opportunity to win the promoted prizes, especially the high-value prizes, McDonald's promotional games have produced a substantial amount of revenue over and above the normal revenue stream. Such games, in fact, have been purposefully designed to induce, and have induced, additional customer patronage so that customers will have more opportunities to win instantly and/or to accumulate combinations of winning game pieces. The consumers' perception that they have the opportunity to win such prizes, especially the high-value prizes, by patronizing McDonald's restaurants has thus been material to the increased product sales and corresponding increased revenue and profits McDonald's has enjoyed while the promotions ran. According to a 2001 news report, Alan Feldman, then-President and Chief Operating Officer of McDonald's, the Americas, credited promotions such as McDonald's games as generating "an unnatural spike in sales."

a. ***The Scheme to Fix McDonald's Promotional Games***

19. McDonald's has extensively advertised and promoted each of the games it has offered to the public. Specifically, McDonald's explicitly and/or implicitly represented in commercial advertising and promotion that all customers had a fair and equal opportunity to win all prizes, including the

more valuable high-value prizes. As further explained below, such representations were literally false, deceptive and/or misleading.

20. Moreover, McDonald's has expressly represented in commercial advertising and promotion the specific odds of winning specific prizes, including high-value prizes. As further explained below, such representations were literally false, deceptive and/or misleading.

21. For nearly 20 years prior to August 2001, McDonald's contracted with Simon Marketing, Inc. ("Simon") to operate its customer loyalty programs, including promotional games such as the ones described above, on McDonald's behalf. At all relevant times, Simon acted as McDonald's agent in conducting such customer loyalty programs. Simon has claimed in litigation against McDonald's that it was a virtual captive of McDonald's, and reported in an SEC filing that 78 percent of Simon's net sales were to McDonald's.

22. Beginning in or about 1995 if not earlier, Simon's Director of Security, Jerome P. Jacobson, a/k/a "Uncle Jerry" ("Jacobson"), who had been entrusted with the responsibility of ensuring the integrity of McDonald's promotional games, began a conspiracy to fix such games by directing rare winning high-value game pieces to fellow conspirators.

23. Between at least 1995 and August 2001, Jacobson embezzled at least $20 million worth of high-value prize pieces in such games as "The Deluxe Monopoly Game at McDonald's," "Disney's Masterpiece Collection Trivia Challenge at

McDonald's," "Monopoly Game at McDonald's," "Hatch, Match and Win," "Who wants to be a Millionaire Game," and "Pick Your Prize Monopoly at McDonald's."

24. Jacobson and/or his co-conspirators sold the embezzled winning pieces to a host of others who then claimed (or recruited others to claim) the grand prizes from McDonald's.

25. On or about April, 2000, the Federal Bureau of Investigation ("FBI") began an investigation of McDonald's promotional games. At some time before and/or while compromised games were underway, the FBI informed McDonald's that there were problems with the random distribution of McDonald's game pieces. Despite knowing that the integrity of its promotional games had been compromised, McDonald's continued to advertise and promote its games as though customers stood a fair and equal chance of winning the high-value prizes. Such representations were all literally false, deceptive and/or misleading.

26. On August 21, 2001, the United States Department of Justice ("DOJ") and the FBI announced the discovery of the Jacobson's scheme and the arrest of eight individuals, including Jacobson, associated with the scheme. In announcing the arrests, then Attorney General of the United States, John Ashcroft, commented that "[t]his fraud scheme denied McDonald's customers a fair and equal chance of winning." A corporate press release issued by McDonald's about the arrests likewise quoted its Chairman and Chief Executive Officer, Jack M. Greenberg, as describing the scheme as "a highly sophisticated

inside game of fraud and deception."

27. On or about April 5, 2002, Jerome Jacobson pleaded guilty to charges of conspiracy and mail fraud. Approximately 50 others have also entered guilty pleas.

28. Upon disclosure by McDonald's to the public that its games promotions had been fixed for years, McDonald's created an independent task force to review all its promotions procedures. In response, industry observers noted that McDonald's introduction of long-available, sophisticated security procedures to ensure the integrity of its games promotions raised disturbing questions about its lack of vigilance in the past.

IV. *CLASS ACTION ALLEGATIONS*

29. Phoenix, pursuant to Rule 23 of the Federal Rules of Civil Procedure, brings this action as a class action on behalf of itself and all other similarly situated Burger King® Franchisees which operated restaurants in markets in and outside the United States where and when McDonald's ran the rigged games promotions identified herein (hereinafter "Class BK Franchisees").

30. Phoenix and its Affiliate Franchisees have directly competed at all relevant times with nearby McDonald's fast food restaurants, which ran McDonald's rigged promotional games described herein. As the direct and proximate result of McDonald's false, misleading and/or deceptive advertising and unfair competition, customers were diverted from Phoenix and its Affiliate

Franchisees, who accordingly not only lost profits due, *inter alia,* to reduced sales, but also incurred costs in connection with common counteractive efforts to retain those customers. Phoenix's claims, as well as those of its Affiliate Franchisees, are typical of the claims of the Class BK Franchisees.

31. The members of the Class are so numerous that the joinder of all members is impracticable. The Class includes over 1100 Burger King Franchisees.

32. There are questions of law and fact common to the Class, including all of the elements of a Lanham Act false advertising violation as follows:

(a) Whether McDonald's made false, misleading and/or deceptive statements of fact about its products in commercial advertising and promotion;

(b) Whether such statements either deceived, or had the capacity to deceive a substantial segment of potential customers;

(c) Whether the deception was material and likely to influence customers' purchasing decisions;

(d) Whether McDonald's products were in interstate commerce; and

(e) Whether Class BK Franchisees have been damaged as a result of the statements at issue.

33. Phoenix will fairly and adequately represent

and protect the interests of the members of the Class. Its interests are not antagonistic to, but rather are coincident with, the interests of other Class members. Phoenix will vigorously prosecute this action, and has retained counsel who is competent and experienced in class actions and other complex litigation, including Lanham Act false advertising litigation, and is fully qualified to prosecute the claims of the Class.

34. The issues of law and fact that are common to the Class as a whole predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

35. Nearly all, if not all of the primary questions pertinent to the liability of McDonald's are questions common to the Class as a whole because the issues relate to the same defendant, the same advertising, and the same competitive injury. The only individual issues relate to the amount of the damages suffered.

V. *THE CLAIMS FOR RELIEF AGAINST MCDONALD'S*

(Violations of Section 43(a) of the Lanham Act)

36. Phoenix for itself and on behalf of the Class BK Franchisees repeat and make a part hereof each and every allegation set forth in paragraphs 1 through 35 of the Complaint.

37. The Class BK Franchisees competed directly at all relevant times with McDonald's restaurants which ran McDonald's rigged games promotions described herein.

38. McDonald's used false, deceptive and/or misleading descriptions of fact and/or misrepresentations of fact regarding their promotional games in commercial advertising and/or promotion. These advertisements actually deceived and/or had the tendency to deceive a substantial part of the audience for McDonald's messages.

39. McDonald's engaged in these false, deceptive and/or misleading descriptions of fact and/or misrepresentations of fact in commercial advertising and/or promotion nationwide and abroad, including in Georgia and in this District, and the effects of McDonald's acts throughout the United States were intended to and did injure the Class BK Franchisees, including in Georgia and in this District.

40. McDonald's misrepresented that each player in its promotional games had a fair and equal chance of winning high-value prizes and further misrepresented the specific odds of winning such high-value prizes.

41. McDonald's misrepresentations concerned McDonald's products, services and/or commercial activities.

42. The promotional games were inextricably linked to, and in some cases physically attached to, McDonald's products such as french fries and

soft drinks. The misrepresentations were material to their customers' decisions to patronize McDonald's restaurants and to purchase McDonald's products.

43. Moreover, each promotional game piece itself constituted a unique McDonald's product, and McDonald's expressly and/or implicitly misrepresented that players stood a fair and equal chance of winning the grand prize with each such piece.

44. All such misrepresentations took place in interstate commerce.

45. When McDonald's finally disclosed to the public that its games had been fixed for years, a McDonald's spokesman identified as one of McDonald's "top priorities" its "responsibility" to "return the money." McDonald's earned substantial windfall and "unnatural" profits as the direct and proximate result of falsely, misleadingly and/or deceptively advertising and promoting its fixed promotional games. An appropriate share of such profits to be demonstrated at trial should be returned to, and are lawfully due to the Plaintiff Franchisees as competitors injured by McDonald's false, misleading and/or deceptive advertising and promotion.

46. The BK Class Franchisees have also been damaged directly and proximately as a result of McDonald's false, misleading and/or deceptive advertising and unfair competition in an amount to be demonstrated at trial. Specifically, McDonald's actions have caused, *inter alia,* a diversion of

trade away from the Plaintiff Franchisees.

47. Evidence continues to mount that McDonald's conduct was intentional and/or sufficiently reckless over all or some of the period its games were rigged, above and beyond the conduct required for liability under § 43(a) of the Lanham Act, to subject McDonald's to treble damages or an award above McDonald's profits, pursuant to 15 U.S.C. § 35.

48. After learning that its games had been compromised sometime before August 2001, McDonald's knowingly and deliberately continued to advertise and promote its promotional games as though the games were fair.

49. Reactions in the industry to the scandal also included such concerns as McDonald's "disturbing lack of vigilance in the past." These observations and industry custom and practice reinforce that McDonald's knowingly and/or sufficiently recklessly failed to timely institute proper procedures to ensure the integrity of its games promotions. Even the "Blue Ribbon Panel of Advisors" which McDonald's subsequently appointed to review its promotional game security procedures rejected McDonald's long-time practice of "a single party overseeing game security." Here that "single party" for twenty years was Simon: not only a self-proclaimed "captive" of McDonald's, but the employer of the ringleader of the criminal scheme. And yet, McDonald's chose to settle its claims against Simon concerning the rigging of its games by *paying Simon* a settlement worth $16 million!

50. Upon information and belief, a prosecuting attorney for the United States also elicited sworn testimony in one of the criminal trials indicating that even though computer programs were supposed to randomly select where the big prizes would go, McDonald's was involved in rerunning some of these programs under suspect circumstances.

51. Upon information and belief, McDonald's responded to the original filing of this Complaint with the terse statement to the press that *"our* customers . . . [ha]ve moved on and so have we." (Emphasis added). This suit is intended to ensure that before "moving on," McDonald's returns to the Class BK Franchisees what they are rightfully due under the law from the wrongful and deceptive diversion of *their* customers.

DEMAND FOR JUDGMENT

WHEREFORE, Phoenix for itself and the Class BK Franchisees demand:

1. That this Court declare this Complaint as a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and certify the Class defined herein;

2. That this Court order McDonald's to disgorge an appropriate share of all profits associated with sales generated by the fixed promotional games;

3. That this Court award to Phoenix and the Class BK Franchisees their actual damages, in amounts to be demonstrated at trial for the harms directly and proximately caused by McDonald's

false, deceptive and/or misleading advertising, promotion and/or marketing;

4. That this Court award Phoenix and the Class BK Franchisees, treble the proof of actual damages and/or an award above McDonald's profits, pursuant to 15 U.S.C. § 35;

5. That this Court award Phoenix and the Class BK Franchisees, other damages incurred, including, but not limited to the costs of price reductions, promotions and other advertising costs incurred to respond to the fixed promotional games;

6. That this Court award Phoenix and the Class BK Franchisees, the costs and expenses they have incurred, including all reasonable attorneys' fees;

7. That this Court award Phoenix and the Class BK Franchisees, pre-judgment and post-judgment interest; and

8. That this Court grants Phoenix and the Class BK Franchisees, such other and further relief as the Court deems just and proper.

A TRIAL BY JURY IS DEMANDED FOR ALL ISSUES SO TRIABLE.

Respectfully submitted,

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In the Supreme Court of the United States

PHOENIX OF BROWARD, INC., PETITIONER

V.

MCDONALD'S CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether, in a suit involving a claim for false advertising under section 43(a) of the Lanham Act, the Eleventh Circuit correctly determined that an allegation that the plaintiff was the defendant's "direct competitor" was not *per se* sufficient to confer prudential standing and that—given the attenuated and speculative injury alleged and the potential for duplicative damages under the particular facts of the case—the plaintiff should be denied prudential standing to press a claim.

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INTRODUCTION

This case does not merit this Court's review. The Eleventh Circuit's decision employs a flexible, multifactor test to assess prudential standing in light of the particular facts before the court. This test was first adopted for Lanham Act cases in *Conte Brothers Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998) (Alito, J.), based on authority from this Court in the antitrust context, and its appropriateness has not been questioned by any court since. To the extent that there is any remaining tension in the case law, it concerns only whether "direct competitor" status is *necessary* for a plaintiff to have prudential standing to press a claim under the Lanham Act. No court of appeals has held that "direct competitor" status is categorically *sufficient* to confer such standing, regardless of the other circumstances in the case—here, for example, the attenuated and speculative nature of the alleged damages and the significant risk of duplicative recovery. In short, this case does not implicate any conflict of authority, either among the circuits or with this Court's cases. The petition should be denied.

STATEMENT OF THE CASE

A. Background

The circumstances giving rise to this case are unique in the history of Lanham Act litigation. The case's origins lie in a criminal conspiracy to which McDonald's and its customers fell victim. As the district court below acknowledged, there appears never to have been any other case "where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to

the *felonious conduct* of *third* parties." Pet. App. 42a (emphases in original).

In the late 1980s, McDonald's introduced various prize promotions, including its popular "Monopoly" game, in which customers were given the opportunity to win food and cash prizes by collecting game pieces patterned after the popular board game. Participants could win up to $1 million by obtaining "instant win" pieces or by grouping pieces to form "monopolies." The promotional games were operated under contract by a third-party vendor, Simon Marketing, which was entrusted with the sole responsibility to "seed" the games by randomly placing winning game pieces into the stream of commerce.

In 2000, the Department of Justice informed McDonald's for the first time that it was conducting an investigation into the promotional games. Ultimately, on August 21, 2001, the FBI announced that it had arrested Simon Marketing's director of security, Jerry Jacobson, and several other people, all of whom were charged with conspiring to compromise McDonald's games through the theft and fraudulent redemption of winning high-value game pieces.

Immediately after the FBI's announcement, a variety of consumer class actions were filed against McDonald's, alleging claims for consumer fraud, negligence, unjust enrichment, and a host of related torts. Less than a year later, McDonald's settled these cases by, among other things, agreeing to implement a $15 million instant giveaway that provided class members and the general public with an opportunity to win fifteen $1 million prizes. This giveaway—coupled with another $10 million in prizes that McDonald's voluntarily awarded immediately

after the FBI's announcement—resulted in McDonald's providing its customers with an opportunity to win a total of $25 million. This exceeded the dollar value of the game pieces that Jacobson and his co-conspirators had diverted from customers through their criminal conduct.

The Jacobson conspiracy was a disaster for McDonald's. In addition to the $25 million in additional giveaways, the company suffered massive damage to its reputation and goodwill—damage that, because it is rooted in the loss of the public's trust, will require significant time and effort to regain.

B. Proceedings Below

Nearly five years after the FBI announced the arrest of Jacobson and his co-conspirators, and nearly four years after McDonald's settled all the consumer class action lawsuits arising from the conspiracy, Phoenix of Broward—a Florida company owning a single Burger King franchise in Fort Lauderdale—brought this putative class action lawsuit under the false advertising provision of the Lanham Act, 15 U.S.C. § 1125(a). The suit alleged that "McDonald's explicitly and implicitly represented to the public that players stood a fair and equal opportunity to win certain grand prizes * * * when in fact the promotional games had been fixed by a criminal ring who embezzled the high-value game pieces and prevented the public from winning such prizes." The result of these "misrepresentations," the complaint alleged, was to "divert business away" from Phoenix and force it to incur costs to combat that diversion.

McDonald's moved to dismiss the lawsuit, asserting, among other things, that Phoenix lacked prudential standing to press its false advertising

claim. The district court granted the motion. It noted that "[t]he Eleventh Circuit has not addressed what test the court should use in determining whether a plaintiff has prudential standing to bring a Lanham Act false advertising claim." Pet. App. 43a. It then examined the approaches used in other circuits before concluding that the correct analysis was set forth by the Third Circuit in *Conte Brothers Automotive, Inc.* v. *Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998). Pet. App. 44a. The *Conte Brothers* court—seeking to provide decisional clarity for prudential standing in the context of the Lanham Act—had adopted the prudential standing test for antitrust claims articulated by this Court in *Associated General Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), which employs a five-factor analysis to assess the fundamental question underlying the concept of prudential standing, namely, whether the claimant is the "proper plaintiff" to bring the claim. *Id.* at 544. The five factors include "(1) the nature of the plaintiff's alleged injury, (2) the directness or indirectness of the asserted injury, (3) the proximity or remoteness of the party to the alleged injurious conduct, (4) the speculativeness of the damages claim, and (5) the risk of duplicative damages or complexity in apportioning damages." Pet. App. 44a (citing *Conte Bros.*, 165 F.3d at 563).

Noting its "doubts that Congress [in the Lanham Act] sought to redress advertising rendered false by the criminal conduct of third parties," Pet. App. 45a, and its conclusion that "the injury to Phoenix's commercial interests caused by the advertisements can hardly be described as typical," *id.* at 46a, the district court conducted a careful analysis of the five

Conte Brothers factors. It concluded that Phoenix lacked standing to pursue its Lanham Act claim:

> Given the existence of more directly injured parties, the tenuousness and sheer speculativeness of Phoenix's damages claim, and the possibility of multiple duplicative recoveries, the court concludes that Phoenix does not have prudential standing to bring a § 43(a) false advertising claim against McDonald's.

Id. at 50a.

The Eleventh Circuit affirmed. It first undertook to determine whether the prudential standing doctrine applied to limit the scope of Lanham Act standing at all. Noting that "Congress is presumed to incorporate background prudential standing limitations unless the statute expressly negates such principles," the court of appeals joined both of the other circuits to address this question in concluding that "Congress did not intend to abrogate prudential standing limitations when it enacted the Lanham Act." Pet. App. 9a-11a.

Having concluded that prudential standing principles may operate to restrict the scope of Lanham Act standing, the court went on to consider what approach it should employ in determining the availability of prudential standing for a claim under the Lanham Act. "After surveying the caselaw," the court elected to "join the Third and Fifth Circuits and adopt the test for prudential standing articulated in *Conte Bros.*" *Id.* at 12a. In so doing, it rejected Phoenix's proposed "categorical" test, which would have conferred standing upon every plaintiff that claimed to be a direct competitor alleging a

competitive injury. *Id.* at 14a. Such a categorical rule, the court suggested, would not comport with the purposes of the Lanham Act or the *Conte Brothers* analysis, which "is designed to determine whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff's 'ability to compete' in the marketplace and erosion of the plaintiff's 'good will and reputation' that has been directly and proximately caused by the defendant's false advertising." *Id.* at 20a (quoting *Conte Bros.*, 165 F.3d at 234-36).

The Eleventh Circuit then undertook a careful analysis of the facts of this case in light of the *Conte Brothers* factors, ultimately concluding that the court had correctly denied prudential standing. The court of appeals based its decision on "the attenuated link between the alleged injury and McDonald's alleged misrepresentations, the speculative nature of the claimed damages, the potential complexity in apportioning damages, and the significant risk of duplicative damages." Pet. App. 32a.

Specifically, the court noted that the fraud by Jacobson and his cohorts rendered only *some* representations false—namely, the representations that customers had a fair and equal chance of winning one of the "rare 'high-value'" prizes. After all, the odds of winning millions of lower or mid-value prizes, including free food and other awards, were not affected by the conspiracy. Thus, Phoenix's claim would have required proof that McDonald's representations relating to the "rare, 'high-value'" prizes—as opposed to the other prizes that customers were far more likely to win—lured customers away from Phoenix's restaurant. According to the Eleventh Circuit, this was simply too tenuous and attenuated,

and the damages resulting from such an injury would have been speculative at best. *Id.* at 24a-25a, 28a. Further, the Eleventh Circuit noted that if Phoenix were afforded standing in the case, then every potential competitor of McDonald's in the nation would also be entitled to standing, presenting a serious risk of duplicative damages. *Id.* at 30a-32a.

The totality of these factors indicated that although Phoenix alleged itself to be a "direct competitor" alleging a "competitive injury," it did not have prudential standing to bring a Lanham Act claim against McDonald's for any advertising rendered false by the Jacobson conspiracy. *Id.* at 32a-33a. This petition followed.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's usual criteria for certiorari. The circuit conflict asserted in the petition is illusory, constructed from *dicta* and a misinterpretation of the cases. Moreover, to the extent that any tension exists in the cases, it is not implicated here. No court has held that an allegation of direct competitor status is, by itself, categorically sufficient to support prudential standing regardless of the other facts and circumstances in the case. Thus there is no decision in conflict with the Eleventh Circuit's decision here, which denied standing to a direct competitor because of the attenuated and speculative nature of the alleged claim of injury, among other things.

To be sure, some circuits have, in the past, articulated a relatively rigid and categorical approach to prudential standing under the Lanham Act—holding that a plaintiff that is *not* in direct competition with the defendant may *not* establish

prudential standing, regardless of the other facts. The emergence of the *Conte Brothers* analysis represents a move away from that more rigid approach, such that courts will now consider a variety of facts and circumstances in deciding whether *any* plaintiff—even one *not* in direct competition with the defendant—has standing to sue under the Lanham Act. As *Conte Brothers* itself explained, "standing under the Lanham Act does not turn on the label placed on the relationship between the parties." 165 F.3d at 235.

At the same time, no circuit has held categorically that a plaintiff who *is* a "direct competitor" *always* has prudential standing to assert a claim under the Lanham Act no matter how attenuated or speculative the alleged competitive injury is. And of the jurisdictions that have had occasion to apply the *Conte Brothers* five-factor test, not one of them has held that the test is limited to cases involving non-competitors, as Phoenix contends it should be. It is not surprising, then, that the petition provides no plausible reason to conclude that any other court of appeals would have decided this case differently under its own case law—the *sine qua non* of a "square" conflict warranting this Court's attention.

Although Phoenix contends that denying standing to direct competitors who have alleged a distinct competitive injury would "undermine[]" the objectives of the Lanham Act (Pet. 27), the *Conte Brothers* test employed by the Eleventh Circuit and others will *not* likely deny standing to direct competitors in the typical case. As Phoenix itself recognized below, "any direct competitor [should] readily satisfy the elements of the [*Conte Brothers*]

test." Reply Br. on Appeal at 2. Thus the real question is not whether applying the *Conte Brothers* test in direct competitor cases is systematically inconsistent with the purposes of the Lanham Act—and it plainly is not—but rather whether the Eleventh Circuit's application of the *Conte Brothers* analysis was correct based on the facts of this particular case.

This is not a typical case. The false advertising claim here—which arose in highly unusual circumstances involving criminal wrongdoing by third parties—was asserted against McDonald's Corporation by an individual Burger King franchisee with a particularly attenuated and speculative claim of injury. The claim by this franchisee (and by the other franchisees it hoped to represent) rested on the notion that it lost customers because of alleged misrepresentations about whether consumers would have a fair and equal chance of winning the rarest few of the many prizes offered in a McDonald's promotional game. Further, the attenuated claim of injury asserted here was no different than those that could have been asserted by any other restaurant or group of restaurants that McDonald's customers might also patronize.

Whether the courts below properly denied Phoenix prudential standing under these circumstances is a fact-bound question that does not merit this Court's review. The petition should be denied.

I. There is no conflict among the circuits with regard to the Question Presented.

Phoenix devotes the bulk of its petition to a purported circuit conflict between "categorical"

jurisdictions, which award standing to direct competitors based on a mere allegation of "competitive injury," and "flexible" jurisdictions, which permit consideration of other facts as well, as part of a more holistic inquiry into the appropriateness of prudential standing. The conflict is illusory. There are no truly "categorical" jurisdictions in this sense, and the "flexible" jurisdictions do not align as Phoenix describes them. The petition thus has no basis for asserting an "intolerable" circuit conflict or, indeed, any continuing circuit conflict at all.

A. The *Conte Brothers* analysis is garnering an emerging consensus among the circuits.

There cannot be any serious doubt about the appropriateness of the standing analysis that then-Judge Alito and the *Conte Brothers* court drew from this Court's decision in *Associated General Contractors of California* v. *California State Council of Carpenters*, 459 U.S. 519 (1983). And if there were any such doubt, that doubt would be dispelled by the broad acceptance of *Conte Brothers* by every court that has considered it thus far. *Conte Brothers* has been on the books for nearly 10 years, and its application of this Court's flexible, multifactor standing analysis in the Lanham Act context has never been questioned by another court, much less rejected. The Third, Fifth, and Eleventh Circuits all have adopted the *Conte Brothers* analysis to determine prudential standing for false advertising claims. *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 180 (3d Cir. 2001); *Procter & Gamble Co.* v.

Amway Corp., 242 F.3d 539 (5th Cir. 2001).[1] The *Conte Brothers* approach has been endorsed by both the Restatement (3d) of Unfair Competition, § 3, cmt f (1995) and the leading scholarly authority on competition law. *See* 4 *McCarthy on Trademarks and Unfair Competition* § 7:32 n.1 (4th ed. 1996) ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors* * * *.").

Phoenix does not challenge *Conte Brothers* head-on but instead complains that it is or should be limited to cases where the plaintiff is not in direct competition with the defendant. In other words, Phoenix contends that as long as the plaintiff alleges that it falls within the category of "direct competitors," any allegation of competitive injury will necessarily suffice to demonstrate prudential standing.

The cases do not support that view. To date, only two of the courts of appeals—the Fifth and the Eleventh, in the decision below—have had the opportunity to apply *Conte Brothers* in a case involving parties who claimed to be direct competitors. Those courts have reached the same conclusion: the multifactor analysis outlined in

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[1] The Eighth Circuit also has considered the *Conte Brothers* test but has not yet had occasion to decide whether to adopt it for all Lanham Act standing inquiries. See *American Assoc. of Orthodontists* v. *Yellow Book USA, Inc.*, 434 F.3d 1100, 1104 (8th Cir. 2006) (declining to determine appropriate test for Lanham Act standing where plaintiff could not satisfy any possible test).

Conte Brothers applies equally in all cases—as it was designed to—regardless of the "label" attached to the parties. *Conte Bros.*, 165 F.3d at 235; see also Pet. App. 20a; *Procter & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 562 (5th Cir. 2001); *Logan* v. *Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 461 (5th Cir. 2001).[2] This is not surprising. As the *Conte Brothers* court explained, its aim in importing this analysis into the Lanham Act context was to "provide[] appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing" under §43(a). 165 F.3d at 236.

As discussed further below, there simply is no contrary authority. No court of appeals has held that direct competitor status is, by itself, sufficient to confer prudential standing. No court of appeals has attached "categorical" significance to the plaintiff's status as a direct competitor and refused to look beyond its bare allegation of injury when prudential standing was at issue. And Phoenix's attempt to draw such a categorical distinction from *Conte Brothers* itself also fails. In short, there is no conflict of law for this Court to resolve.

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[2] District courts from all the circuits that have adopted *Conte Brothers* also have applied it in cases involving direct competitors. See, *e.g.*, *Pernod Ricard USA LLC* v. *Bacardi USA*, 505 F. Supp. 2d 245, 252 (D. Del. 2007); *KIS, S.A.* v. *Foto Fantasy, Inc.*, 240 F. Supp. 2d 608, 610-11, 616 (N.D. Tex. 2002); *Alphamed Pharm. Corp.* v. *Arriva Pharm. Corp.*, 391 F. Supp. 2d. 1148 (S.D. Fla. 2005).

B. No circuit holds that a plaintiff's status as a direct competitor alleging competitive injury is categorically sufficient to confer prudential standing no matter how speculative or attenuated the claimed injury is.

Phoenix's argument for a circuit conflict is based on *dicta* and a logical fallacy. It begins with cases holding that *non*-competitors necessarily *lack* standing—an issue on which there may be some tension among the circuits, but which is not presented here. Then it suggests that, in those cases, competitor status is the sole criterion for standing. As long as the plaintiff is a direct competitor of the defendant, any allegation of competitive injury will be enough to confer prudential standing and to entitle the plaintiff to proceed with its claim, regardless of the nature of that injury or any other facts or circumstances.

This is a *non sequitur*. Even if a competitive relationship is *necessary* for prudential standing, it does not follow that such a relationship is always *sufficient* for prudential standing. And the petition identifies no case in which any court of appeals has held that a plaintiff's allegation that it is a direct competitor alleging a competitive injury is *per se* sufficient to confer prudential standing, even in the face of arguments that the alleged injury is simply too attenuated.

The petition characterizes five circuits as having embraced the purported "categorical" position: the Ninth, Seventh, Tenth, Second, and Third. But the cases do not support that characterization. Of the sixteen court of appeals cases cited in the petition to support the proposition that a direct competitor

alleging competitive injury categorically has Lanham Act standing, only one actually involved both a direct competitor and a finding of prudential standing, and even in that case the court did not confer such standing "categorically," based upon an allegation of injury of the kind at issue here. It is true, of course, that some of those cases contain language suggesting the existence of a "categorical" rule, under which being "a competitor of the defendant and alleg[ing] a competitive injury" is the central criterion for prudential standing. *Stanfield* v. *Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995); see also *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001) (quoting *Stanfield*). But not one of them reaches the very different conclusion for which Phoenix cites them: that direct competitor status is categorically *sufficient* to confer standing, no matter how attenuated the injury.

For example, of the three Ninth Circuit cases Phoenix cites, only one upheld the plaintiff's standing—and in that case, the plaintiff was a non-competitor. *Waits* v. *Frito-Lay*, 978 F.2d 1093, 1109 (9th Cir. 1993), cited in Pet. 17-18. The *Waits* court's general statement that "claims of false representations in advertising are actionable * * * when brought by competitors of the wrongdoer" was *dicta* and, in any event, was a statement not about prudential standing but about the existence of a cause of action for false advertising under Section 43(a). *Ibid.* *Waits* does not purport to set out a general rule about the *sufficiency* of competitor status to confer prudential standing. In *Jack Russell Terrier Network of N. Cal.* v. *American Kennel Club*, 407 F.3d 1027 (9th Cir. 2005), by contrast, the court concluded that the plaintiffs lacked standing where

they conceded that they did not compete with the defendants. And in *Barrus* v. *Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995), the Ninth Circuit refused to find standing for *consumers* who had failed to allege either "commercial injury [or] competitive injury."

Similarly, all the Seventh Circuit cases cited by Phoenix deny prudential standing, and none can reasonably be read to support Phoenix's claim that direct competitor status is sufficient to confer prudential standing for Lanham Act claims. See Pet. 17. In *L.S. Heath & Sons, Inc.* v. *AT&T Information Systems*, 9 F.3d 561 (7th Cir. 1993), the court denied prudential standing because the parties were not competitors. In *Johnny Blastoff, Inc.* v. *Los Angeles Rams Football Co.*, 188 F.3d 427 (7th Cir. 1999), the court denied standing because the plaintiff could show no injury at all, never mind "competitive injury." And the court in *Dovenmuehle* v. *Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697, 699 (7th Cir. 1989), denied standing on the ground that the plaintiff lacked any ownership interest in the trade name that allegedly was misused. In fact, the *Dovenmuehle* passage cited in the petition states only that "*[t]ypically*, plaintiffs suing under [the Lanham Act] are business competitors * * *." Pet. 17. While this is undeniably true, it is not helpful in determining whether *all* business competitors would necessarily have prudential standing.

The Tenth Circuit, too, rejected prudential standing in both cases cited by Phoenix. See Pet. 17. In *Stanfield* v. *Osborne Industries*, 52 F.3d 867 (10th Cir. 1995), the court denied prudential standing to a plaintiff whose relationship with the defendant was contractual and non-competitive. In *Hutchinson v. Pfeil*, 211 F.3d 515 (10th Cir. 2000), the court denied

standing because the alleged injury—which involved only the "*potential* for harmful competition" in the future—was deemed too speculative to support either Article III or prudential standing. *Id.* at 520 (emphasis added).

Finally, of the four Second Circuit cases cited by Phoenix in support of its claim that the Second Circuit is a "categorical" jurisdiction, all but one rejected prudential standing. *ITC Ltd.* v. *Punchgini, Inc.*, 482 F.3d 135 (2d Cir.), cert. denied, 128 S. Ct. 288 (2007); *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001); *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994); see Pet. 17-18 & n.6. And in the remaining case, the court based its finding of prudential standing, not on the fact that the plaintiff was a "direct competitor alleging competitive injury," but rather on the fact that the allegedly false advertising drew a direct comparison between the plaintiff's and defendant's products. *Societe Des Hotels Meridien* v. *La Salle Hotel Operating P'ship*, 380 F.3d 126, 130 (2d Cir. 2004). Thus the court's resolution rested as much on the nature of the injury—an injury markedly different from the one here—as it did on the competitor status of the plaintiff.

In short, none of the cases cited by Phoenix is actually in conflict with the Eleventh Circuit's decision here. No circuit has held that a party's status as a direct competitor is sufficient to support prudential standing no matter how attenuated the alleged competitive injury is.

C. Phoenix's contention that the Third Circuit itself intended the *Conte Brothers* analysis to apply only to non-competitors is belied by the unequivocal language of *Conte Brothers* and the cases that followed it.

Phoenix also attempts to draw support for the supposed conflict of authority from the Third Circuit itself, arguing that *Conte Brothers* was designed as a test specifically "for non-competitors" (Pet. 21), on the theory that direct competitors would categorically have standing. This ignores the express language of then-Judge Alito's opinion in *Conte Brothers*, which takes care to explain that the case would have come out the same way even if the parties *did* compete at the same level of the marketplace. 165 F.3d at 235. As the court's opinion explained, "[u]nder the reasoning we adopt today, standing under the Lanham Act does *not* turn on the label placed on the relationship between the parties." *Ibid.* (emphasis added).

The insignificance of the "label" attached to the parties' relationship was confirmed by the Third Circuit in *Joint Stock Society* v. *UDV North America, Inc.*, 266 F.3d 164 (3d Cir. 2001). In that case, then-Judge Alito emphasized "the premise implicit in the * * * *Conte Brothers* test that a direct competitor will *usually* have a stronger commercial interest than a non-competitor." *Id.* at 183 n.10 (emphasis added). This language confirms that plaintiffs in different competitive (or non-competitive) relationships with the defendant should be subjected to the same five-factor test articulated in *Conte Brothers*. See *Pernod Ricard USA LLC* v. *Bacardi USA*, 505 F. Supp. 2d 245, 252 (D. Del. 2008) (applying *Conte Brothers* test

in determining that direct competitor had Lanham Act standing).

In addition, while the Third Circuit has not yet expressly applied *Conte Brothers* in a direct competitor case, it has never limited its *Conte Brothers* decision or been faced with (and declined) an opportunity to apply it in any direct competitor case where prudential standing was at issue. The petition cites *Novartis Consumer Health, Inc.* v. *Johnson & Johnson-Merck Consumer Pharmaceutical Co.*, 290 F.3d 578 (3d Cir. 2002), as a case presenting such an "opportunity" (Pet. 23), but that case did not involve Lanham Act prudential standing at all. Rather, *Novartis* examined the standard for determining whether a Lanham Act plaintiff could demonstrate the irreparable harm necessary to justify a preliminary injunction. Indeed, the Third Circuit expressly held that the irreparable harm standard was *not* identical to the prudential standing standard. 290 F.3d at 595. Similarly, in both *GlaxoSmithKline Consumer Healthcare, L.P.* v. *Merix Pharmaceutical Corp.*, 197 Fed App'x 120 (3d Cir. 2006), and *Wellness Publishing* v. *Barefoot*, 128 Fed. App'x 266 (3d Cir. 2005)—also cited as evidence of the Third Circuit's unwillingness to apply *Conte Brothers* in direct competitor cases—the defendant did not challenge prudential standing before the Third Circuit.[3] It goes without saying that a

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[3] In a later proceeding in *Barefoot* involving the same parties, prudential standing *was* challenged—and the district court applied the *Conte Brothers* analysis, concluding that the direct competitor plaintiff had standing. *Wellness Publishing* v. *Barefoot*, No. 02-3773 (JAP), 2008 WL 108889, *13 (D. N.J., Jan. 9, 2008).

litigant's decision not to challenge prudential standing has no bearing on how the court would have analyzed such a challenge if one had been raised.

Phoenix's resort to Third Circuit cases from before *Conte Brothers* is unpersuasive. As with the cases from other circuits discussed above, these cases do not support the proposition that as long as the plaintiff and defendant are direct competitors, any allegation of competitive injury is sufficient to confer prudential standing. The case of *Thorn* v. *Reliance Van Co.*, 736 F.2d 929, 931 (3d Cir. 1984) holds only that a *non*-competitor may have Lanham Act standing in appropriate circumstances. And *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990), does not address standing at all.[4]

Given the broad acceptance of the *Conte Brothers* analysis among the courts that have considered it—and the fact that no court ever has limited *Conte Brothers* or refused to apply it in a direct competitor case—there is no reason to believe that the analysis for direct competitor standing is particularly controversial or that it will be any more controversial

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[4] The case of *Warner-Lambert Co.* v. *BreathAssure, Inc.*, 204 F.3d 87 (3d Cir. 2000), cited in Pet. 19 n.7, is not a standing case either. The passage Phoenix quotes actually describes a Second Circuit case that does not itself support Phoenix's position. See *id.* (discussing *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1995) (noting that a Lanham Act plaintiff "need not demonstrate that it is in direct competition with the defendant" to have standing, and that "[o]n the whole, we have tended to require a more substantial showing where the plaintiff's products are not obviously in competition with defendant's products, or the defendant's advertisements do not draw direct comparisons between the two")).

in the future than it has been in the past. Again, every court to consider a true dispute about prudential standing in the context of direct competitor claims has concluded that the *Conte Brothers* multifactor analysis should apply, rather than any *per se* or categorical rule. There is no need for this Court to weigh in on the issue.

II. The Eleventh Circuit's treatment of prudential standing is entirely consistent with the purposes underlying the Lanham Act and advances the principles of prudential standing.

On its merits, the Eleventh Circuit's approach to prudential standing is in no way inconsistent with the purposes of the Lanham Act, as Phoenix contends. Pet. 27 ("[d]enying standing to direct competitors undermines" the purposes of the Lanham Act"). In practice, the *Conte Brothers* analysis employed below will result in the denial of standing to a direct competitor only in cases involving claims that bear a tangential relationship at best to the values embodied in the Lanham Act. Moreover, Phoenix's contrary view would have the effect of entirely eliminating prudential standing considerations from Lanham Act cases involving direct competitors—a result for which there is no reason or authority.

1. Contrary to Phoenix's contention, the *Conte Brothers* analysis applied by the courts below does not, and does not purport to, "deny[ ] standing to direct competitors"—at least in any but the most unusual circumstances. Indeed, Phoenix itself argued below that "[t]he *Conte Bros.* test * * * has little utility when applied to direct competitors alleging competitive harm[,] because such plaintiffs

invariably satisfy its requirements." Opening Br. on Appeal at 9 (emphasis added). As then-Judge Alito pointed out in *Joint Stock Society*, the flexible *Conte Brothers* test includes "the premise * * * that a direct competitor will *usually* have a stronger commercial interest than a non-competitor," and thus will typically survive a Lanham Act standing challenge. 266 F.3d at 183 n.10 (emphasis added).

The cases confirm that genuinely "prototypical" plaintiffs who are the direct competitors of the defendants will be found to have prudential standing under the *Conte Brothers* test—and that only those with marginal, highly attenuated Lanham Act claims will not. For example, in *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447, 461 (5th Cir. 2001), the Fifth Circuit applied *Conte Brothers* in a direct-competitor case and held that where the defendant's "literally false advertising about its own goods influenced its customers to buy its products instead of Logan's product," and where the plaintiff was the only person who could bring a Lanham Act false advertising claim against the defendant, the plaintiff had standing to bring the claim. Similarly, in *Pernod Ricard USA LLC v. Bacardi USA*, 505 F. Supp. 2d. 245, 252 (D. Del. 2007), the district court employed the *Conte Brothers* test in concluding that the plaintiff had standing to bring a Lanham Act claim where the parties were direct competitors and the defendant allegedly made false representations about its own product that harmed the plaintiff's reputation, goodwill, and ability to compete in the marketplace.

As noted above, only one court of appeals (other than the court below) ever has determined that a direct competitor's claim was so attenuated that it

failed to meet the *Conte Brothers* standing analysis. That lone case was *Procter & Gamble Co.* v. *Amway Corp.*, in which the Fifth Circuit denied standing to plaintiff Procter & Gamble in a Lanham Act suit based upon "fraudulent misrepresentations"—specifically, false and inflammatory accusations that Procter & Gamble had links to Satanic cults—made to potential employees to convince them to work for and buy from Amway, "resulting ultimately in lower sales of some of P&G's products." 242 F.3d at 563. Phoenix itself conceded to the court below that *Procter & Gamble* was a "bizarre case" involving a "non-traditional injury." Opening Br. on Appeal at 16. Thus by Phoenix's own admission, the only court of appeals case ever to deny a competitor standing under the *Conte Brothers* analysis—other than this one—was strange and aberrational. Accordingly, there can be no serious concern that the Eleventh Circuit's approach will erode the fundamental protections the Lanham Act offers to competitors in the marketplace.

2. Further, Phoenix's proposed standing rule is overbroad and would effectively eliminate prudential standing as a requirement for an entire class of plaintiffs in suits under the Lanham Act. The categorical rule advocated by Petitioner would confer standing on *all* direct competitor plaintiffs alleging competitive injury in *all* circumstances, without consideration of factors like the remoteness of the alleged injury, the potential for duplicative damages, the existence of other potential plaintiffs who have been more directly harmed, and so on—in short, without consideration of the principles of prudential standing at all. What Phoenix is claiming, in effect, is that *any* prudential limitation on Lanham Act

standing for direct competitors somehow contravenes the purposes of the statute.

Neither the cases nor the statute itself supports that view. It is possible, of course, for Congress to eliminate prudential limitations on standing if it so desires. See *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). But as the Eleventh Circuit explained, "Congress is presumed to incorporate background prudential standing principles [in legislation] unless the statute expressly negates such principles." Pet. App. 9a-10a. Every court to consider this issue, including the court below, has concluded that Congress did not abrogate prudential standing principles in the Lanham Act. See *ibid.*; *Procter & Gamble*, 242 F.3d at 562. Although Phoenix has not challenged that conclusion in this forum, the upshot of its argument here is that a § 43 claim—by its terms available to "*any person* who believes that he or she is or is likely to be damaged" by false advertising—must be given its maximum Article III scope, unlimited by the considerations of "judicial governance" that make prudential standing a fundamental component of federal jurisprudence. There is simply no justification, either in the jurisprudence of this Court or in the legislative history of the Lanham Act, for limiting the usual scope and limitations of prudential standing in this context.

III. The unusual facts of this case would make it a poor vehicle for resolving any issues related to prudential standing for Lanham Act claims.

As shown above, there is no circuit conflict on the question presented—and certainly not a "deep" or "intolerable" one—and there is no merit to Phoenix's

claim that applying a flexible, fact-based analysis in determining whether a direct competitor has prudential standing somehow violates the purposes of the Lanham Act. Even if there were some arguable conflict in the cases, however, the anomalous circumstances from which this case arose make it an inappropriate vehicle for resolving the true scope of prudential standing for Lanham Act claims.

1. Most fundamentally, the issue of whether the parties are genuinely "direct competitors" was not litigated below, and McDonald's does not contest it here. But in light of Phoenix's attempt to imbue "direct competitor" status with categorical legal significance, the Court would do well to wait to resolve the issue presented in this petition until it has the opportunity to review a case in which the parties' "direct competitor" status is both well defined and, on the facts of the case, inarguable.

In fact, this case cleanly illustrates the emptiness of a "categorical" approach that turns the words "direct competitor" into a shibboleth for Lanham Act standing. "Direct competitor" status is, in the words of the *Conte Brothers* court, merely a "label" that tells us little or nothing about the appropriateness of prudential standing in a particular case.[5] Put simply, there are different degrees of "directness." 165 F.3d at 233. The competitive relationship in this case is far from typical in Lanham Act cases. Phoenix operates a single Burger King restaurant in Fort Lauderdale, Florida. McDonald's is an international corporation with annual revenues approaching $22

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[5] Cf. *Bell Atlantic* v. *Twombly*, 127 S.Ct. 575 (2006) (bare allegation of conduct described as "parallel" is not sufficient to state a claim for restraint of trade under the antitrust laws).

billion. McDonald's does not own or operate any restaurants in Fort Lauderdale, Florida, although its franchisees do operate several such restaurants in the area.[6] Those franchisees pay McDonald's rent, fees, and royalties based upon a percentage of their monthly sales. Thus it is the franchisees who would benefit most directly from any customers lured away from Phoenix's restaurant.

In short, this particular plaintiff operates at a different level of the marketplace than the entity it chose to sue. McDonald's Corporation "competes" with Phoenix in the same sense that it competes with each of the 7,171 Burger King restaurants, 6,673 Wendy's restaurants, and tens (if not hundreds) of thousands of other national and independent quick-service restaurants in the United States. The operative question, though, is whether the relationship between McDonald's and Phoenix is the kind of relationship that should trigger a finding of prudential standing, giving Phoenix (and the tens of thousands of similarly situated plaintiffs) the ability to bring a claim under the Lanham Act. That is a question that the facile use of the term "direct competitor" does not answer.

To illustrate this point more vividly, consider the striking similarities between the competitive relationship in this case and the competitive relationship in *Conte Brothers*. In both cases, the parties were engaged in business in the same industry, but at different economic levels—the plaintiffs at the "retail" level, selling products directly

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[6] Although McDonald's does own and operate approximately 15% of its restaurants nationwide, all the McDonald's locations in Fort Lauderdale are operated by McDonald's franchisees.

to consumers, and the defendants at the "wholesale" level, selling products to retailers and other middlemen. In both cases, the "wholesaler" defendant was accused of disseminating false advertising that increased sales of its own product (which it did not sell directly to consumers) at the expense of other wholesalers' products that were sold by the plaintiff retailers. *Conte Bros.*, 165 F.3d at 224. Economically, the competitive relationships at issue in the two cases were very similar. But in *Conte Brothers*, the Third Circuit concluded—based in part upon the plaintiff's concession—that the parties were *not* "direct competitors." *Id.* at 235. In this case, the court reached the opposite conclusion, observing generally that "Burger King is one of McDonald's direct competitors in the fast food industry." Pet. App. 22a n.6. These different labels attached to similar facts highlight the dangers of a categorical approach: it simply does not provide a principled way to identify which Lanham Act claims merit standing and is likely to lead to inconsistent results.

At a minimum, though, if the Court were otherwise inclined to consider whether to require a categorical approach to prudential standing for "direct competitors," the Court would be well served to wait for a case in which the competitive status of the parties is *more direct* than it is here—or at least where the parties' competitive status has been explored in a more complete record.

2. The atypical nature of the "false advertising" claim and alleged injury at issue here also makes this case a poor vehicle for considering the question presented. As noted above, the false advertising claim in this case is highly unusual—if not unique in

the history of Lanham Act litigation. The district court explained that it was "unable to locate any case where a company brought a Lanham Act claim against a competitor whose advertising became false or misleading due to the *felonious conduct* of *third* parties." Pet. App. 42a (emphasis in original). The core purpose of the Lanham Act is to make advertisers liable for "anticompetitive conduct." No such conduct occurred here: indeed, the Department of Justice publicly declared that McDonald's was a "victim" of the same criminal conspiracy that allegedly rendered the advertising at issue "false."

Further, in light of the unusual facts of this case, the alleged injury here was indeed extremely attenuated. As the courts below recognized, Phoenix would be required to prove that its particular franchise lost customers because of representations that McDonald's customers had a fair and equal chance of winning certain rare and specific high-value prizes—rather than because of the customers' personal preference for McDonald's, differences in quality or convenience, McDonald's other advertising, or the customers' interest in winning the more common, lower and mid-value prizes that were unaffected by the third-party conspiracy. This is a heavy burden for Phoenix to bear, and it may make it difficult for Phoenix to prove that it suffered any injury at all. Cf. *Holmes* v. *SIPC*, 503 U.S. 258, 270-74 (1992) (finding no standing to sue under the Clayton Act in part because of a lack of proximate cause, in that if certain plaintiffs were allowed to sue, the court would first need to determine the extent to which their losses were the result of the alleged conspiracy or other factors, including potentially their own poor business practices). The Eleventh Circuit

properly concluded that this theory was insufficiently direct, concrete, and distinct—even at the pleading stage—to support a finding of prudential standing.

Even apart from the merits of the Eleventh Circuit's decision, Phoenix's unusual theory of causation and injury makes this case far from typical. For this reason as well, this case would be a poor vehicle for this Court's consideration of the question presented in Phoenix's petition.

CONCLUSION

This Court's intervention is not required here. The Eleventh Circuit's decision does not present any unresolved issue of law, and the petition does not demonstrate any conflict of authority among the circuits or with any decision of this Court. The petition should be denied.

Respectfully submitted.

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PHOENIX OF BROWARD, INC.,

Petitioner,

v.

MCDONALD'S CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Respondent's efforts to obfuscate the clear and stark conflict this case presents are unavailing. Respondent does not even acknowledge the fact that the decision below charted the circuits' disarray. See Pet. App. 14a-20a. Though respondent is quick to point out (Br. in Opp. 20-21) that petitioner *urged* the court of appeals to hold that direct competitors alleging a competitive injury automatically satisfy the multifactor test set forth in *Conte Bros. Automotive* v. *Quaker State-Slick 50*, 165 F.3d 221 (3d Cir. 1998), the court of appeals expressly *rejected* that effort to harmonize the two standards. See Pet. App. 19a-20a. The court of appeals thus acknowledged widespread conflict on this issue and concluded that it could not (or should not) be defused.

Respondent retreats to the position that five circuits simply did not mean what they said when they held that, "to have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury." *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001) (citation omitted); see also pp. 4-5, *infra* (collecting cases). But respondent cannot point to a single decision by the Second, Third, Seventh, Ninth, or Tenth Circuits in which a direct competitor has been denied prudential standing to bring a false advertising claim under the Lanham Act (much less one in which those courts of appeals have even purported to apply the multifactor *Conte Bros.* analysis to such a claim). And, even as respondent casually (and erroneously) dismisses those circuits' repeated pronouncements as mere *dicta*, it selectively plucks a single sentence from *Conte Bros.* as evidence that then-Judge Alito's opinion purported to establish a definitive standing test for direct competitors'

claims. It did not. Read with even the slightest attention to context, that decision plainly meant to *expand* standing to encompass certain claims by *non-direct competitors*. That is why, as respondent concedes (Br. in Opp. 18), the Third Circuit has never applied it to a direct-competitor case in the nearly ten years since it was decided.

Respondent ultimately resorts to the claim that this case is so "unusual" or "anomalous" as not to warrant this Court's review. Br. in Opp. 9, 23-24, 26-28. Nothing could be further from the truth. Here, the owner of a Burger King restaurant alleged that McDonald's—its archrival—knowingly engaged in false advertising designed to lure the former's customers to the latter's restaurants. There is nothing "atypical" (Br. in Opp. 26) about such a Lanham Act claim. Finally, respondent's claim that this Court should decline review because "the issue of whether the parties are genuinely 'direct competitors' was not litigated below" (Br. in Opp. 24) is simply astounding. The notion that a fact that was required by law to be deemed true (see Fed. R. Civ. P. 12(b)(6)), was not disputed below, and that respondent concedes it "does not contest" before this Court (Br. in Opp. 24) is somehow an obstacle to review makes no sense—particularly because dismissal on standing grounds necessarily precedes full litigation of such controversies.

I. THE COURTS OF APPEALS ARE DIVIDED

Respondent concedes that "some circuits have, in the past, articulated a relatively rigid and categorical approach to prudential standing under the Lanham Act," Br. in Opp. 7, but respondent nevertheless

insists that the Eleventh Circuit's adoption of the multifactor *Conte Bros.* analysis presents no conflict. Respondent is wrong.

A. Most obviously, respondent is at a loss to explain why the court of appeals expressly recognized that adopting the *Conte Bros.* standard furthered a circuit conflict on this issue. Pet. App. 12a-20a. Indeed, respondent quotes liberally from the court of appeals' opinion (Br. in Opp. 5-7, 23), but omits any mention of that court's repeated references to the widespread confusion among the circuits. See, *e.g.*, Pet. App. 12a n.2, 14a, 16a, 18a n.5. Although the decision below was somewhat imprecise in describing the conflict (see Pet. 17-19 & nn.6-7), it correctly observed that the circuits are in disarray. Respondent does not even mention the court's analysis, much less explain how it could be fairly characterized as heralding an "emerging consensus" in favor of the *Conte Bros.* test for direct-competitor plaintiffs. Br. in Opp. 10.

That omission is particularly striking because the court of appeals observed that the *Conte Bros.* standard represented a significant departure from the categorical approach, and expressly refused to hold that the tests were functionally indistinguishable when applied to direct competitors. Pet. App. 19a-20a. To the contrary, it held that a "direct competitor" with a "competitive" injury—the standing requirements of the categorical circuits—would not satisfy the multifactor test. *Id.* at 19a. Respondent makes no attempt to reconcile that holding with its assertion that no conflict exists.

Nor does respondent answer other courts' acknowledgment that there is confusion among the circuits. See *American Ass'n of Orthodontists* v.

Yellow Book USA, 434 F.3d 1100, 1103-1104 (8th Cir. 2006) ("[A] number of circuits have held, *categorically*, that false advertising claims * * * are actionable only 'when brought by competitors of the wrongdoer,'" while "[o]ther circuits have adopted a less categorical multi-factor test.") (citation omitted) (emphasis added); *Renaissance Leasing, LLC* v. *Vermeer Mfg.*, 2006 WL 1447032, at *3 (W.D. Mo. May 23, 2006) ("Under the categorical approach, adopted by the Second, Seventh and Tenth Circuits, to have standing to assert a Lanham false advertising claim, 'the plaintiff must be a competitor of the defendant and allege a competitive injury.'") (citation omitted). Remarkably, respondent appears to suggest that the Eighth Circuit's decision in *American Association of Orthodontists* (Br. in Opp. 11 n.1) supports its claim that the *Conte Bros.* test is "garnering an emerging consensus" among the circuits (*id.* at 10). But that court expressly noted the existence of divergent standards; it did not (as respondent would have it) imply that the circuits are moving toward uniformity.

B. Respondent does not dispute that five circuits—the Second, Third, Seventh, Ninth, and Tenth—have consistently stated that the Lanham Act's prudential standing requirements are satisfied when suit is "brought by competitors of the wrongdoer" alleging a competitive injury. *Waits* v. *Frito-Lay*, 978 F.2d 1093, 1109 (9th Cir. 1993); see also, *e.g.*, *Telecom Int'l Am., Ltd.* v. *AT&T*, 280 F.3d 175, 197 (2d Cir. 2001) ("[T]o have standing for a [Lanham Act] false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.") (internal quotation marks and citation omitted); *Joint Stock Soc'y* v. *UDV N. Am.*,

266 F.3d 164, 180 (3d Cir. 2001) ("Section 43(a) is intended to provide a private remedy to a commercial plaintiff who[se] * * * commercial interests have been harmed by a competitor's false advertising.") (internal citations omitted); *L.S. Heath & Son* v. *AT&T Info. Sys.*, 9 F.3d 561, 575 (7th Cir. 1993) ("In order to have standing to allege a false advertising claim * * * the plaintiff must assert a discernible competitive injury."); *Jack Russell Terrier Network of N. Cal.* v. *American Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005) ("[A] plaintiff must show * * * that the injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant."); *Stanfield* v. *Osborne Indus.*, 52 F.3d 867, 873 (10th Cir. 1995) ("[T]o have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury.").

Respondent claims that those repeated pronouncements are mere "*dicta*" (Br. in Opp. 13) and that those circuits stand ready to deny prudential standing to direct competitors alleging a competitive injury. But respondent fails to identify a single instance where a direct competitor with a competitive injury has been denied prudential standing by the Second, Third, Seventh, Ninth, or Tenth Circuit. That is because (not surprisingly) the categorical circuits correctly take prior decisions at their word and adhere to those repeated statements. It should come as no surprise, then, that the only two circuits that have imported the *Conte Bros.* test for direct competitors' claims had not expressly adopted the "categorical" rule. If there is any "logical fallacy" here (Br. in Opp. 13), it is respondent's belief that the categorical circuits will soon line up to adopt the *Conte Bros.* analysis. In the nearly ten years since

Conte Bros. was decided, not a single "categorical" circuit has adopted it, nor have any of those circuits denied standing to a direct competitor asserting a competitive injury.[1]

What is more, respondent casually disregards the numerous cases in which direct competitors have brought Lanham Act cases in these circuits without any suggestion that they were subject to a multifactor standing test.[2] Br. in Opp. 19. But many jurisdictions permit courts to raise prudential standing questions *sua sponte*. See, *e.g.*, *MainStreet Org. of Realtors* v. *Calumet City*, 505 F.3d 742, 749 (7th Cir. 2007) (dismissing a claim for lack of prudential standing after raising the issue *sua sponte*);

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[1] Of course, respondent does not identify any decision by the categorical circuits characterizing their prior decisions as "*dicta*." To the contrary, at least one circuit—the Ninth—has expressly rejected an invitation to disavow its prior statements. In *Barrus* v. *Sylvania*, 55 F.3d 468 (9th Cir. 1995), the court confirmed that *Waits*—which respondent specifically dismisses as "*dicta*" (Br. in Opp. 14)—"*fully analyzed* the standing requirements under [Section 43(a) of the Lanham Act]," 55 F.3d at 469 (emphasis added), and further held that "[t]he discussion of false advertising in *Waits* was not mere dicta," *id.* at 470.

[2] See, *e.g.*, *Newcal Indus.* v. *Ikon Office Solutions*, 2008 WL 185520 (9th Cir. Jan. 23, 2008); *L. & J.G. Stickley* v. *Cosser*, 2007 WL 4171651 (2d Cir. Nov. 27, 2007); *Playtex Prods.* v. *Procter & Gamble Co.*, 126 Fed. App'x 32 (2d Cir. 2005); *Peaceable Planet* v. *Ty, Inc.*, 362 F.3d 986 (7th Cir. 2004); *Research Sys. Corp.* v. *IPSOS Publicite*, 276 F.3d 914 (7th Cir. 2002); *S.C. Johnson & Son* v. *Clorox Co.*, 241 F.3d 232 (2d Cir. 2001); *First Health Group Corp.* v. *BCE Emergis Corp.*, 269 F.3d 800 (7th Cir. 2001); *Hot Wax* v. *Turtle Wax*, 191 F.3d 813, (7th Cir. 1999); *Cottrell, Ltd.* v. *Biotrol Int'l*, 191 F.3d 1248 (10th Cir. 1999); *Southland Sod Farms* v. *Stover Seed Co.*, 108 F.3d 1134 (9th Cir. 1997).

Addiction Specialists v. *Township of Hampton*, 411 F.3d 399, 405 (3d Cir. 2005) (raising prudential standing *sua sponte*); *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) ("[W]e are required to address [a standing] issue * * * even if the parties fail to raise the issue before us. Our obligation, moreover, extends to the prudential rules of standing.") (alteration in original) (citations omitted). The fact that none of the "categorical" circuits has ever even questioned—much less denied—standing to a direct competitor alleging a competitive injury speaks volumes.

One such instance is particularly telling. As everyone agrees (Pet. 24; Br. in Opp. 10-11), the Fifth Circuit imported the *Conte Bros.* test for direct competitors' claims in *Procter & Gamble Co.* v. *Amway*, 242 F.3d 539 (5th Cir. 2001). The very same facts at issue in that case gave rise to parallel litigation in the District of Utah. *Procter & Gamble Co.* v. *Haugen*, No. 1:95-cv-00094-TS. The Utah case involved the very same plaintiffs and at least seven of the same defendants (including the parties alleged to be principally responsible for the false advertising). Even *after* the Fifth Circuit held in 2001 that plaintiffs were subject to the *Conte Bros.* test and therefore lacked standing, 242 F.3d. at 564, plaintiffs continued to pursue their claims in the Utah case, where the Tenth Circuit's "categorical" rule governs. Indeed, in 2007, the Utah plaintiffs prevailed at trial on their Lanham Act claim, recovering a verdict of $19.25 million against the very same defendants who six years earlier had prevailed in the Fifth Circuit on standing grounds. *Procter & Gamble Co.* v. *Haugen*, No. 1:95-cv-00094-TS, Dkt. 1145. As we noted (Pet. 24 n.10), these dramatically divergent results are a

direct consequence of the circuits' conflicting standards. Respondent does not even mention the Utah litigation, much less attempt to explain or defend this discrepancy.

C. Respondent's attempt to read the Third Circuit's *Conte Bros.* decision as establishing a standing test for direct competitors' claims is unavailing. For starters, the plaintiffs there had expressly conceded that "the parties are not in direct competition." 165 F.3d at 236.[3] Nor can the single sentence of the court's opinion respondent extracts bear such weight. Read in context, the court's refusal to rely on "the label placed on the relationship between the parties" plainly refers to the plaintiff's belated assertion that the parties "were 'competitors' in some *limited* sense." *Id.* at 235 (emphasis added); see also *ibid.* ("*nominally* competitive relationship" would not suffice) (emphasis added). Here, by contrast, it is undisputed that the parties are in *direct* competition and that the false advertising caused a *competitive* injury. Significantly, respondent concedes that the Third Circuit has never applied *Conte Bros.* to a direct-competitor claim. Br. in Opp. 11, 18. And, in *Warner-Lambert Co.* v. *BreathAsure, Inc.*, 204 F.3d 87 (3d Cir. 2000), that court reaffirmed its view that it "require[s] a more substantial showing where the plaintiff's products are not *obviously* in competition with defendant's products." *Id.* at 95 (quoting *Ortho Pharm. Corp.* v. *Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994)). In any event, if *Conte Bros.* applies to direct competitors,

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[3] By respondent's logic, that fact alone makes any statement regarding direct competitors mere dicta. See Br. in Opp. 14-16 (arguing that circuits' statement of the categorical rule were dicta because some involved non-direct competitors).

it is still in conflict with the categorical circuits, and this Court's intervention is no less warranted.

II. REVIEW IS NECESSARY TO VINDICATE THE LANHAM ACT'S CORE PURPOSES, AND THIS CASE PRESENTS NO VEHICLE PROBLEM

A. Respondent acknowledges that "the fundamental question underlying the concept of prudential standing [is] whether the claimant is the 'proper plaintiff' to bring the claim." Br. in Opp. 4. Respondent further acknowledges that "the direct competitors of the defendants" are "genuinely 'prototypical' plaintiffs" under the Lanham Act. Br. in Opp. 21. Respondent nonetheless argues that a direct competitor alleging a competitive injury lacks prudential standing unless it passes the multifactor *Conte Bros.* test. That turns the essential purpose of the Lanham Act—"to protect the public from deceit [and] to foster fair competition," S. Rep. No. 1333, 79th Cong., 2d Sess. 4 (1946)—on its head.

Respondent asserts (without foundation) that petitioner will find it difficult "to prove" that McDonald's false advertising diverted its customers. Br. in Opp. 27.[4] But that is why we have trials before factfinders. Such considerations run to the merits of the case and should have no bearing on prudential

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[4] Petitioner brought this suit as a proposed class action on behalf of all Burger King restaurant owners. Pet. 8. Respondent does not dispute that the false advertising campaign produced an "unnatural spike in sales" (Pet. App. 59a) and that Burger King was its primary competitor (*id.* at 57a). It requires no speculation to suppose that McDonald's reaped those rewards at the expense of its chief rival.

standing analysis when a "prototypical" plaintiff has brought suit.[5]

B. Respondent hopes to depict this case as so far outside the norm as to warrant the bizarre result reached below, but that attempt cannot withstand even casual scrutiny. There is nothing "unusual" about the owner of a Burger King restaurant alleging that false advertising by McDonald's violates the Lanham Act. Notably, respondent does not contest that the fiercely competitive fast-food industry relies heavily on customer promotions to entice customers away from rival restaurants. See Pet. 5-6. And it is utterly beside the point that respondent's "'advertising became false or misleading due to the *felonious conduct* of *third* parties.'" Br. in Opp. 27 (quoting Pet. App. 42a). What matters most for present purposes is that respondent continued to promise customers that they had a "fair and equal" chance to win highly attractive prizes when (as respondent knew) they had no chance at all. In any event, as the district court correctly noted (Pet. App. 42a), false advertising is a strict-liability tort under

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[5] Contrary to respondent's suggestion (Br. in Opp. 27), *Holmes* v. *SIPC*, 503 U.S. 258 (1992), does not encourage courts to deny standing to prototypical plaintiffs based on doubts about their ultimate ability to establish proximate cause. The Court there addressed whether the plaintiff had properly stated a securities fraud claim under RICO, not (as respondent claims) whether there was "standing to sue under the Clayton Act." Br. in Opp. 27. In any event, that decision is perfectly consistent with categorically affording standing to direct competitors under the Lanham Act, because the Court conducted that analysis only *after* noting that the plaintiff admitted that it was asserting only "the rights of customers who *never* purchased manipulated securities." 503 U.S. at 270-271 (emphasis added).

the Lanham Act, so respondent's claimed good faith is irrelevant.

Finally, there is no merit to respondent's assertion that this Court should await a case in which "the issue of whether the parties are genuinely 'direct competitors'" has been "litigated below." Br. in Opp. 24. Respondent does not dispute that petitioner adequately pleaded that it was respondent's direct competitor, which is all that Fed. R. Civ. P. 12(b)(6) requires. Nor does respondent suggest that it challenged petitioner's status as a direct competitor in the district court or in the court of appeals. And respondent concedes that it "does not contest" that fact here. Br. in Opp. 24. The suggestion that a fact that is completely undisputed before this Court somehow presents an obstacle to review is baseless. In any event, dismissal on prudential standing grounds is necessarily preliminary to the litigation of any such controversies. The legal issue presented here was fully developed below, and this case presents an ideal opportunity for the Court to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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